United States Court of Appeals for the Second Circuit



APPENDIX

United States Court of Appeals

For the Second Circuit.

IN THE MATTER

OF

SAPPHIRE STEAMSHIP LINES, INC.,

Bankrupt-Appellant, JUL

SECOND C

and

J. READ SMITH,

Trustee-Appellant,

against

WINTHROP, STIMSON, PUTNAM & ROBERTS. Attorneys for E. BERGENDAHL Co., Inc. (New York), and E. BERGENDAHL CO., Inc. (Philadelphia), Creditors,

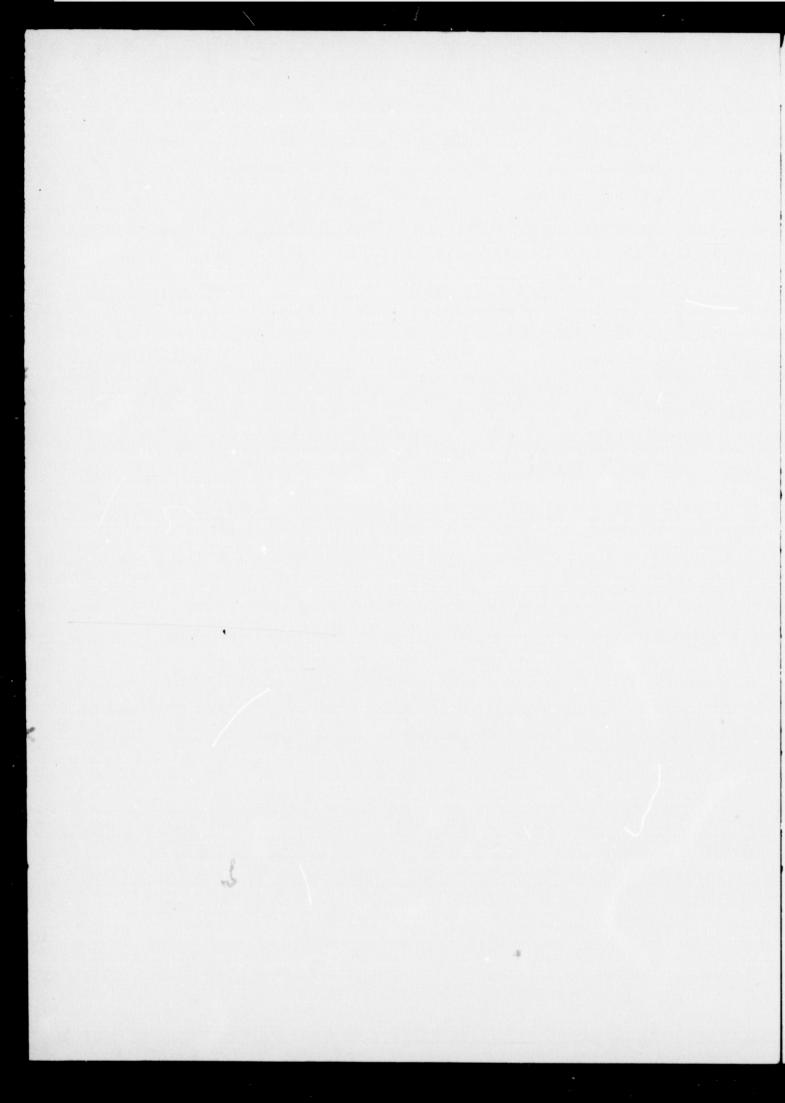
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,

JOINT APPENDIX.

Louis P. Rosenberg, Attorney for Trustee-Appellant, J. Reid Smith. 16 Court Street, Brooklyn, N. Y. 10001 (212) UL 5-6840.

WINTHROP, STIMSON, PUTNAM & ROBERTS, Attorneys Pro Se, Appellees, 40 Wall Street, New York, N. Y. 10005 (212) WH 3-0700.



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United States Court of Appeals

FOR THE SECOND CIRCUIT.

IN THE MATTER

of

SAPPHIRE STEAMSHIP LINES, Inc.,

Bankrupt-Appellant,

and

J. READ SMITH,

Trustee-Appellant,

against

WINTHROP, STIMSON, PUTNAM & ROBERTS, Attorneys for E. Bergendahl Co., Inc. (New York), and E. Bergendahl Co., Inc. (Philadelphia), Creditors,

Appellees.

Docket Entries.

1967

- Mar. 13 Filed petition schedules, summary of assets and liabilities of executory contracts, affdvt. of J. Reid Smith under Rule 1-2—referred to Referee.
- Mar. 15 Filed petition and certified copy of referee's order authorizing debtor continue business.
- Mar. 17 Rec'd from referee copy of affdyt. of Erling Thompsen amending schedule A-2
- Mar. 22 Filed petition and order to show cause for temporary stay—with memo endorsed; referring same to Referee Herzog. It is so ordered.—Bryan J. (dlvd. to referee)

- Mar. 31 Filed statement of affairs-cs
- Apr. 5 Filed certified copy of referees order amending schedules
- May 2 Filed referees certificate on petition to Review referees order vacating stay order—ret 5/23
- May 18 Filed memorandum of Cromwell, House & Varian in opposition to petition to review.
- May 24 Filed memo endorsed on petition to review:

 "Motion withdrawn. So ordered.—Tyler, J."

 (dlve. one copy to referee)
- June 2 Filed certified copy of referees order adjudging debtor a bankrupt and appointing a trustee

1968

Mar. 21 Filed consent that Harry Z. Kaufman be substituted as atty. in place and stead of Levin & Weintraub, Esq.—John J. Olear, Jr. Clerk (dlvd to Referee)

1969

- July 14 Filed affdvt. and notice of motion for an order amending Referee's order staying Raymond Coles—ret. 7/22.
- July 22 Filed stipulation adj. above motion to 8/12/69
- Aug. 13 Filed memo endorsed on motion of 7-22-69 granting same on default—so ordered—MacMahon, J. (dlvd. copy to referee.)
- Aug. 25 Filed notice of settlement and order amending and modifying referee's order so as to permit the continuation of the prosecution of the action, (dlvd. copy to Referee) Mac-Mahon, J. (on Sep 11, 1969 filed copy of above order in Civil Case) 66 Civ 4295

1971

- Jan. 25 Filed notice of settlement. Ordered that the order of Ref. Herzog. dated 14-Mar-67 staying the continuation and/or prosecution of an action proceeding in the U.S.D.C. for the S.D.N.Y. Docket #66 Civ 4295 be lifted and modified and amended as so as to permit the continuation of the prosecution of the aforesaid action. Mac Mahon U.S.D.J.
- July 2 Filed referee's certificate on review of Order dtd. 12-31-70, filed 2 folders re petition . . . ret. 7/27/71.
- July 19 Filed memorandum of intervening non-trad defts in support of the trustees petition to review the referees disapproval of settlement agreement.
- July 20 Filed brief of appellant trustee J. Read Smith.

1972

- Jan. 28 Filed transcript dated July 29, 71
- Feb. 2 Filed Opinion #38227, * * * The trustee's petition to review the the decision of the Referee is denied; the non-trade defendants' motion to review the Referee decision as to those defendants alone is denied, without prejudice to the right of such defendants to move the Referee for approval of their agreement of compromise and the motion of the major (trade) defendants to intervene is denied. It is so ordered . . . Lasker, J.
- Feb. 11 Filed Bankruptcy Judge's Certificate on allowances re: application of Joseph L. Alioto, Esq. retained as special counsel to the trustee, etc. Ret. Tuesday, March 5th, 1974 at 10:00 A. M. in Room. 506. (Brown Folder To Be Returned.)

- Mar. 4 Filed Memorandum of Winthrop, Stimson, Putnam and Roberts in support of its application for attorneys fee and reimbursement for disbursements, as attorneys for E. Bergendahl Co. Inc. (Philadelphia, et al., Dated: 8/16/73.
- Mar. 4 Filed Memorandum of Winthrop, Stimson, Putnam and Roberts in support of its objections to the Referee's Certificate on allowance, as attorneys for E. Burgendahl Co. Inc. (Philadelphia,) et al. Dated: 3/4/74.
- Mar. 4 Filed Affidavit of David Jaffe in support of the application of Winthrop, Stimson, Putnam and Roberts for an allowance of counsel fees, etc. sworn to: 3/1/74. (Seafarers)
- Mar. 4 Filed Affidavit of Peter R. DeFilippi, re: application of Winthrop, Stimson, Putnam and Roberts for an allowance of counsel fees, etc. sworn to: 2/23/74.
- Mar. 4 Filed Affidavic of Joseph H. Spain, in support of Winthrop, Stimson, Putnam and Roberts re: compensation, sworn to: 2/27/74. (Allied Van Lines, Inc.)
- Mar. 4 Filed Affidavit of Emil A. Kratovii, Jr. in support of Winthrop, Stimson, Putnam and Roberts for compensation, sworn to: 3/1/74 (Mathiasen's General Cargo Service, Inc.)
- Mar. 4 Filed Affidavit of Steven Thaler in support of Winthrop. Stimson, Putnam and Roberts for compensation, sworn to: 3/4/74 (Marine Engineers' Beneficial Association)
- Mar. 4 Filed Affidavit of David P. Dawson, in support of Winthrop Stimson, Putnam and Roberts for compensation, sworn to: 3/4/74 (Voyage Repair Corp.)

Mar. 11 Filed Statement by Winthrop, Stimson, Putnam and Roberts in connection with disbursements—re: Joseph L. Alioto, Esq. Special Counsel to the trustee, etc. (undated) forwarded to Judge Pollack—

Mar. 15 Filed Application to fix amount of lien-application of: Patton, Boggs and Blow, sub. by: Szold, Brandwein Meyers and Altman, attorneys for applicant. Dated: 2/6/74.

Mar. 15 Filed Memorandum of Winthrop, Stimson, Putnam and Roberts in support of its application for attorneys fee and reimbursement for disbursements., as attorneys for E. Bergendahl Co. Inc. of Phila.

- Mar. 15 Filed Report re allowances. . . . Remanded for further proceedings pursuant to Opinion filed herewith. Judge Pollack, Dated: 3/15/74. Copy To Bankruptcy Judge, Brown Folder Returned.
- Mar. 15 Filed Opinion No. 40462 re allowances of compensation. . . . The recommendation of the Bankruptcy Judge on the allowances to be paid from and by reason of the creation of the settlement fund is remanded to the Bankruptcy Judge for further proceedings, not inconsistent with this opinion, on such notice to creditors as may be required in the premises. So Ordered, Judge Pollack, Dated: 3/15/74. Copy To Bankruptcy Judge. (See Opinion For Full Details.)
- Apr. 9 Filed Notice of Appeal to Court of Appeals.

 Re: Order entered by Pollack, J., Dated 3/15/74, which disaffirms the Certificate of Allowance of Hon. Asa S. Herzog, Bank. Judge, Dated 2/8/74. By Louis P. Rosenberg, Atty. for Trustee., Dated Apr. 8, 1974.

Application by Winthrop, Stimson, Putnam & Roberts for Attorney's Fee for Professional Services Rendered to the Bankrupt Estate and for Reimbursement of Disbursements in Connection Therewith.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

To the Hon. Asa S. Herzog, Referee in Bankruptcy:

The application of Winthrop, Stimson, Putnam & Roberts respectfully represents:

- 1. Applicant is attorney of record for E. Bergendahl Co., Inc. (New York) and E. Bergendahl Co., Inc. (Philadelphia), creditors of the above-named bankrupt.
- 2. The principal asset of the bankrupt estate has at all times been the antitrust action presently pending in the United States District Court for the District of Columbia entitled "J. Read Smith, As Trustee Of The Estate Of Sapphire Steamship Lines, Inc. (Bankrupt), Plaintiff v. Atlantic & Gulf American Flag Berth Operators, et al., Defendants." In the spring of 1970 the defendants in the antitrust action offered in full settlement of the pending litigation \$1,600,000 and based upon the recommendation of the trustee, his counsel and special antitrust counsel that offer of settlement was approved by this court in a decision dated September 21, 1970.
- 3. Thereafter, principally as a result of the initiative, antitrust experience and efforts of Applicant herein, the \$1,600,000 offer of settlement was, on reargument, disapproved by this court in a decision dated December 18, 1970. In the succeeding two and a half years Applicant opposed successfully all further efforts to settle the

Application by Winthrop, Stimson, Putnam & Roberts for Attorney's Fee, etc.

antitrust action for what we believed and demonstrated to be grossly inadequate amounts.

- 4. Presently there are before the court increased offers aggregating \$2,473,070.12 in full settlement of the pending antitrust action. In the event that the court approves the present offer, the bankrupt estate will be enhanced by the sum of \$873,070.12, representing the difference between the present offer and the \$1,600,000 offer to compromise first approved and later disapproved by this court, resulting principally from the initiative, antitrust experience and efforts of Applicant.
- 5. The reasonable and fair compensation to Applicant for the vast amount of time (1,769 hours) and efforts expended in creating the additional \$873,070.12 fund for the benefit of the estate as a whole (which are more fully described in the affidavit annexed hereto and the memorandum submitted herewith), is \$175,000. Additionally Applicant seeks reimbursement for \$3,000 for disbursements incurred in connection with the services it has rendered to the bankrupt estate.
- 6. No prior application has been made for the relief sought herein, and no other compensation has been received herein by Applicant from the bankrupt or any other person.

Wherefore, Applicant prays (in the event the current settlement offer is approved) that J. Read Smith, the trustee herein, be directed to pay the law firm of Winthrop, Stimson, Putnam & Roberts the sum of \$175,000 as attorney's fee for services rendered in creating the \$873,070.12 fund for the benefit of the estate as a whole and \$3,000 as reimbursement for disbursements incurred in connection with those services, and that Applicant have

Affidavit of Terence H. Benbow in Support of Application

such other and further relief as the court deems just and proper.

Dated: New York, New York August 16, 1973

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS
By: Terence H. Benbow
A Member of the Firm
40 Wall Street
New York, New York 10005

Affidavit of Terence H. Benbow in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of Massachusetts, County of Barnstable, ss:

TERENCE H. Benbow, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before this Court and a member of the firm of Winthrop, Stimson, Putnam & Roberts, attorneys of record for E. Bergendahl Co., Inc. (New York) and E. Bergendahl Co., Inc. (Philadelphia), creditors of the above-named bankrupt. I make this affidavit in support of the application of Winthrop, Stimson, Putnam & Roberts for an attorney's fee of \$175,000 as compensation for the services Winthrop, Stimson has rendered in creating a fund of \$873,070.12 inuring to the benefit of the bankrupt estate as a whole, and for

Affidavit of Terence H. Benbow in Support of Application

reimbursement of disbursements in the amount of \$3,000 incurred in connection therewith.

- 2. For the convenience of the Court it was thought best to include in a single document the factual statement of the nature and extent of the services rendered by Applicant together with the legal and equitable arguments proffered in support of its application. I hereby attest to the accuracy of those factual statements as to the nature and extent of the services rendered by Applicant and the disbursements incurred therewith, and incorporate herein by reference pp. 6-40 of the memorandum submitted herewith in support of the application.
- 3. I hereby certify, as required by Section 62d of the Bankruptcy Act that no agreement or understanding prohibited by Section 62c of the Act has been made, or will be made.
- 4. I hereby certify that no agreement, expressed or implied, prohibited by 18 U.S.C., Section 155 has been made.

(Sworn to by Terence H. Benbow, August 16, 1973.)

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS IN SUPPORT OF ITS APPLICATION FOR ATTORNEY'S FEE AND REIMBURSEMENT FOR DISBURSEMENTS.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

-of-

: No. 67-B-252

SAPPHIRE STEAMSHIP LINES, INC.,

Bankrupt.

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS IN SUPPORT OF ITS APPLICATION FOR ATTORNEY'S FEE AND REIMBURSEMENT FOR DISBURSEMENTS

WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for E. Bergendahl Co., Inc.
(New York) and E. Bergendahl Co., Inc.
(Philadelphia), et al.
40 Wall Street
New York, New York 10005
(212) WH-3-0700

TERENCE H. BENBOW VICTOR S. TRYGSTAD STEVEN A. BERGER,

Of Counsel

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MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS TABLE OF CONTENTS

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MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS

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MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-Y

:

In the Matter

-of-

No. 67-B-252

SAPPHIRE STEAMSHIP LINES, INC., :

Bankrupt. :

-Y

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS IN SUPPORT OF ITS APPLICATION FOR ATTORNEY'S FEE AND REIMBURSEMENT FOR DIS-BURSEMENTS

At the close of the July 16, 1973 hearing on the present settlement offer, the Referee ordered that additional papers, in further support of or in opposition to the present settlement offer or applications for attorneys' fees, be submitted within a limited time. Accordingly, the fee application of Winthrop, Stimson is being submitted at this time to comply with the direction of the Referee. We believe, however, that it would be premature for the Court to address itself to this application or, for that matter, to any other application for an attorney's fee, until such time as a determination has been made to accept a settlement of the pending antitrust action, or until a disposition is obtained after a trial of the action.

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS
Prior to discussing the factual, legal and equitable grounds upon which this application is based, we repeat
the objecting creditors' strong opposition to the present
settlement offer. If, however, the Referee decides to approve the current offer, this memorandum is offered in support of Winthrop, Stimson's application for \$175,000 as
attorney's fee for professional services rendered to the
estate and reimbursement of \$3,000 in disbursements incurred
in this matter.

PRELIMINARY STATEMENT

Although from our participation at the many hearings held on this matter and the several memoranda, exhibits and supporting data submitted by our firm, the Referee is aware generally of our active role, he may not be cognizant of the full extent of our participation. Therefore, we present below an objective summary of the nature and extent of the legal services which we have rendered during the various stages of these proceedings. We respectfully submit that, should the Referee approve the present settlement offer, the conclusion should be reached from the facts summarized below that an additional fund of \$873,070.12 has been created for the benefit of the estate as a result of the initiative and efforts of our firm.

After the Referee rendered his opinion, on September 21, 1970, approving the \$1,600,000 settlement offer, the plight of the general creditors looked bleak. That settlement, after the payment of priority claims, attorneys' fees and administration expenses appeared to leave nothing for the claims of general creditors. Moreover, the reasons offered by Special Counsel in support of the settlement, which were substantially accepted by the Referee in his September 21, 1970 opinion, appeared, on their face, very strong with the resulting consensus that there was little chance of overturning the Referee's decision on a claim of abuse of discretion.

Nonetheless, the Bergendahl corporations believed that a more thorough investigation should be made of the reasons offered by Special Counsel to support his recommendation for acceptance of the settlement. While we agreed with our clients that such action was desirable, the amount of their claims, alone, did not seem to justify incurring the substantial costs required to make such an investigation, together with the necessary legal research and preparation of papers in connection with a possible application for a rehearing. Moreover, at that time we knew very little of the facts and evidence which were available to prove damages, but which later we were able to discover and develop and use as the basis for our joint motion for reconsideration.

Nevertheless we had some promising leads, so we met and conferred with attorneys for other general creditors to review the situation and determine whether they agreed that a more thorough investigation of the availability of evidence and witnesses should be made and, if so, to what extent we might all be willing and able to coordinate our efforts. As a result of these meetings it was concluded that the investigation should go forward and in light of its antitrust expertise Winthrop, Stimson should "carry the ball."

With that background as a preface to the following detailed discussion of the services we have performed on behalf of the bankrupt estate, it must be noted that, at the time we agreed to undertake the initial investigation and research, we never envisioned the continued strong opposition of Special Counsel, urged on by the defendants, or that a motion for a rehearing would result in the vast expenditure of time and effort which subsequently developed. This turned out to be a "snowballing" participation, i.e., at every stage of the subsequent proceedings we found our position to be at odds with that of the Trustee, who was relying on his Counsel, who in turn was relying on Special Counsel. Accordingly, to support our opposition and to uphold the Referee's disapproval of the \$1.6 million settlement, it was necessary at each of the later critical stages in the proceedings for us to continue our active participation in the matter or general

creditors would have received nothing, or next to nothing, on their claims.

LEGAL SERVICES RENDERED TO THE ESTATE BY WINTHROP, STIMSON, PUTNAM & ROBERTS IN THESE PROCEEDINGS

A. Services Rendered through September 14, 1970.

In the summer of 1970, settlement offers totaling \$1,600,000 were made by the defendants and accepted by the Trustee on the recommendation and advice of Counsel and Special Counsel to the Trustee. Thereafter, a Petition for Approval and accompanying papers were filed by the Trustee with the Referee on July 22, 1970. Notice of a hearing on September 14, 1970 was received by Winthrop, Stimson, as attorneys for the two Bergendahl corporations who had filed claims totaling \$118,028 against the Bankrupt for unpaid deck, engine and cabin stores, supplies, etc., furnished to the M/S SAPPHIRE ETTA, M/S SAPPHIRE GLADYS and M/S SAPPHIRE SANDY.*

^{*} Although somewhat collateral to this application, it is of interest to note that prior to the bankruptcy of Sapphire, the two Bergendahl companies had arranged for their Admiralty lawyers to arrest these vessels, but the vessels were subsequently sold on foreclosure of the first mortgage. They received nothing on their In Rem claims against the vessels as there were no proceeds of sale available after payment of wage claims, claims of the first mortgagee and expenses of sale. Their inability to obtain payment was a primary cause of the Bergendahl corporations' becoming insolvent and being forced into

\$

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS

After receiving notice of the hearing our clients requested us to determine whether in our opinion the settlement offers totaling \$1,600,000 were a fair and reasonable compromise of the pending suit against the defendant shipping lines and their association (AGAFBO).

Thereafter, inter alia, we conferred with Counsel and Special Counsel to the Trustee and wrote Special Counsel requesting additional information on the reasons he had stated for recommending acceptance of the offers. We were assured by them that, on the basis of their investigation and study of the facts, the settlement offers were fair and reasonable and should be approved by the Peferee.

Through the services of Wilmer, Cutler & Pickering, our Washington, D. C. correspondents, we obtained copies of Plaintiff's Motion for a Partial Summary Judgment in the District Court of the District of Columbia, Plaintiff's Memorarda in Support of its Motion, and Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and exhibits attached thereto, including the Federal Maritime Commission Report and Decision in Docket No. 65-13, Rates on U.S. Government Cargoes. We also obtained a copy of the Complaint and Amended Complaint in the pending suit. Based on our experience in antitrust

matters and our study of these various documents and papers, our research on the applicable law and a limited analysis of the reasons offered by Special Counsel in his letter of July 16, 1970 to Counsel for the Trustee in support of the proposed settlement, we concluded that the proposed settlement offers totaling \$1,600,000 were not adequate. Thereafter, we conferred with various members of the Creditors' Committee, which had been set up in connection with the original Bankruptcy proceedings, and with Peter DeFilippi, Assistant United States Attorney, and informed them of the results of the research we had conducted within the limited time available and of our conclusion that the proposed settlement should be opposed at the hearing. During the course of these conferences the attorneys for other creditors whom we had consulted expressed the view that they, too, were opposed to the offer.

At the hearing on September 14, 1970 Mr. Benbow, a partner of Winthrop, Stimson and an experienced antitrust attorney, appeared on behalf of our clients and stated our opposition to the proposed settlement. The Referee rendered his decision, dated September 21, 1970, approving acceptance of the settlement on the following grounds: (a) no evidence had been introduced to controvert the fact that basic accounting records of the Bankrupt were missing, (b) efforts by the Trustee and by Special Counsel to locate

these records had been unsuccessful, (c) certain important witnesses were unavailable, and (d) the argument of Special Counsel that he seriously doubted that he could prove damages. The Referee stated that (a) he would like to honor the views of the creditors if he could find justification for them,
(b) all parties agreed that liability was not the problem,
(c) the suggestions by objecting creditors as to how damages could be established were too speculative, and (d) it appeared that Special Counsel had explored all avenues and had concluded that the probability of success in establishing damages was very dim. The Referee, therefore, accepted the recommendation of the Trustee and his Counsel and Special Counsel and approved the \$1,600,000 compromise. (We spent 122 hours on this first stage of the proceedings.)*

B. September 15, 1970 to December 31, 1970.

While awaiting the Referee's decision and subsequent

^{*} Since our services through the September 14, 1970 hearing were rendered on behalf of our clients, the Bergendahl corporations, those initial services may perhaps be viewed as resulting in no direct benefit to the Bankrupt and are not included in the legal services for which we are requesting a fee in this application. However, the time spent on research and preliminary investigation through September 14, 1970 was of substantial help in our later research and investigations.

to receipt thereof, we continued our investigation of the reasons staced by Special Counsel on the difficulty of proving damages. Several extensions of time were requested in which to file a petition for review of the Referee's decision to enable us to make further independent investigations of the missing accounting records and of the unavailability of competent key witnesses. During this period, we conferred again at various times on the telephone and in person with Counsel and Special Counsel to the Trustee, with Peter DeFilippi, and with attorneys for other creditors who had appeared at the hearing on September 14, 1970. We interviewed Mr. Weissberger and Mr. Safir, together with their Counsel, and obtained copies of many of the papers in the record of Strir v. Gibson, the subsidy case which was then on appeal, and were successful in determining that, notwithstanding Special Counsel's statements to the contrary, Mr. Weissberger and Mr. Safir were currently available as witnesses and willing and able to testify in the event the litigation proceeded to trial. We had several interviews with Erling Thompsen, who had been the Treasurer and Chief Accounting Officer of Sapphire Steamship Lines, Inc. from the commencement of its business operations in March of 1965 until it filed a Voluntary Petition for Reorganization Under Chapter XI of the Federal

Bankruptcy Act on or about March 9, 1967, and whose services as Chief Accounting Officer were continued at the request of the Trustee until Sapphire was adjudged a Bankrupt by this Court. We were successful in obtaining valuable information and leads from Mr. Thompsen on the basic accounting records of Sapphire, and on the matter of damages suffered by Sapphire as a result of the illegal conspiracy and acts of the defendants. After we informed the Assistant U.S. Attorney and counsel for other creditors of the results of our investigation and study, and of the success we had had in the matter of finding competent witnesses who were willing and able to testify and the leads we had obtained with respect to the probability of locating or reconstructing missing accounting records of the Bankrupt plaintiff, the unanimous opinion was that (a) a petition for rehearing and for reconsideration of the Referee's decision should be filed, and (b) we should continue and intensify our efforts to develop enough evidence to establish to the satisfaction of the Referee that there was a reasonable probability of proving substantial damage suffered by the plaintiff as a result of the illegal acts of the defendant and that, if the case went to trial, the probable award of damages by a jury, trebled, would be substantially in excess of the \$1,600,000

offer in settlement. The attorneys requested that Winthrop, Stimson, with their extensive and successful practice in antitrust litigation, act as lead attorney for the creditors. Many of them had not had antitrust experience and there would be a substantial saving in expense by avoiding duplication of time which would have occurred if the attorneys for each of the many large and small creditors had conducted independent research in antitrust law and investigations of facts, and then prepared separate petitions with supporting memoranda for submission to the Court. Mr. DeFilippi and Winthrop, Stimson agreed that better results could be obtained at substantially less expense to the Government and to general creditors if the U.S. Attorney's Office and the office of Winthrop, Stimson coordinated their efforts with respect to locating missing accounting records, and the analysis and preparation of memoranda and of exhibits in support of their conclusion that substantial damages could be proved at a trial of the case. In addition, Mr. DeFilippi stated he was not an expert in the field of antitrust litigation and welcomed the opportunity to get the benefit of the antitrust litigation experience and expertise of Winthrop, Stimson.

Thereafter, permission having been obtained from Counsel to the Trustee, representatives of Winthrop, Stimson, the Assistant U. S. Attorney, representatives of the Audit

Branch of the Maritime Administration, who were made available to the U. S. Attorney, and Mr. Erling Thompsen made a trip to the warehouse where the records of the Bankrupt were stored, and went through the books and records of Sapphire. Mr. Thompsen pointed out the accounting documents that he thought were essential for proof of damages. He listed all the basic accounting records which were available and those which were missing, and was able to determine that the missing NCR Ledger cards could be reconstructed from primary sources among the accounting records which were available in the warehouse. From the voyage record files which were located, accountants made available to the Assistant U. S. Attorney by the Internal Revenue Service, with the assistance of Mr. Stavis, Chief of the Audit Branch of the Maritime Administration (who were experts in Maritime accounting and whose primary function was to audit the books and records of shipping companies who received subsidies), prepared detailed statements which indicated a loss of gross revenue of approximately \$2,000,000 during the initial 12-months period of illegal rate-cutting on the part of defendants. This data, together with loss of capital of approximately an additional \$1,500,000 resulting from the bankruptcy of Sapphire, constituted tangible evidence that the settlement offer of \$1,600,000 was very inadequate,

even without taking into account loss of future profits, which also amounted to several millions of dollars. Mr. DeFilippi obtained additional backup information on revenues from Cargo lifted Reports of the MSTS. The U.S. Attorney for the Southern District of New York and Winthrop, Stimson then prepared and filed a Joint Application for Rehearing, together with affidavits and various schedules attached thereto as exhibits, and a joint memorandum of facts and law in support of their Joint Application.

Special Counsel to the Trustee, as his Response to the Joint Application for Rehearing, submitted an affidavit by Maxwell M. Blecher, an attorney employed by the law offices of Special Counsel, in which he stated in substance that at all times since his firm had become involved in the litigation he had been responsible for the preparation and conduct, and had personally conducted substantially all of the settlement negotiations, consulting with Messrs. Sher (Washington, D. C. associate counsel), Collins and Alioto of Special Counsel's firm, and Rosenberg, Counsel to the Trustee. He stated further that on the basis of all the developed facts he had recommended that the Trustee accept defendants' offer of \$1,600,000; that he had considered the objections of the

creditors to the proposed settlement; had carefully examined the facts recited in the affidavits in support of their objections, and found nothing which altered his strong conviction that the \$1,600,000 settlement offer was favorable and should be accepted by the Trustee. He stated again that he "assumed the jury would find (or perhaps defendants would not contest) that there existed a combination and conspiracy in restraint of trade pursuant to which acts violative of Section 810 of the Shipping Act were propounded" and set forth at considerable length various reasons why he considered plaintiff's case on damages to be relatively weak. Mr. Blecher concluded his affidavit by stating:

"By this presentation, I do not wish to imply that there is nothing in the record or available to us that would assist us in establishing both causation and significant damages. The point that we wish to make is that we have weighed the advantages and disadvantages of settlement at the very substantial amount agreed upon, and we have considered both the helpful evidence as well as the adverse evidence. Those now attacking the settlement have not had the opportunity nor the time, nor should they be expected to invest the vast amount of time required, to familiarize themselves with all of the evidence which has been available in the case in order to determine the adequacy of the agreed-upon settlement. I am certain that if attorneys from their offices familiar with antitrust cases were to devote the time required to make a full study of this case, as we have done, they, too, would conclude that this is an excellent settlement."

After receiving Special Counsel's Affidavit and accompanying exhibits in opposition to our Joint Application for Rehearing, we reviewed, analyzed and discussed all of the points raised by Mr. Blecher, and his strong support of the \$1.6 million offer. We worked with the Assistant U. S. Attorney, Mr. DeFilippi, in preparing and submitting to this Court our Creditors' Memorandum in Response to Affidavit of Maxwell M. Blecher, dated November 21, 1970, together with exhibits, in support of our conclusion that the \$1.6 million settlement offer was grossly inadequate, and that a rehearing on the propriety of the settlement should be held.

On oral argument at the hearing held on November 30, 1970, Mr. DeFilippi presented a summary of the studies and investigation of loss of revenue and Mr. Benbow of Winthrop, Stimson presented a summary of the evidence and accounting data which with the assistance of Mr. Thompsen they had been able to locate, in support of their conclusion that there were competent witnesses and sufficient evidence available to Special Counsel to justify the Referee granting the Petition for Rehearing, setting aside his first order approving the settlement, and entering an order disapproving it.

In his decision dated December 18, 1970, the Referee stated that the additional evidence produced painted "an entirely different picture from that presented when the compromise first came on for hearing." He stated that:

"One of the major reasons for approving the compromise in the first instance was my reluctance to overrule special counsel and force him to proceed with a trial in which he was troubled on the proof of damage aspect. I think that new facts presented by the moving parties on this application should resolve some of counsel's doubts." (P. 9 of December 18, 1970 opinion)

Subsequently, we prepared a proposed Order Granting Reargument and Disapproving Compromise of Action, and a Notice of Settlement, which was served on all attorneys who had appeared in the proceeding, which Order was signed by the Referee on December 31, 1970. (We spent 491 hours on this second stage of the proceedings.)

C. January 1, 1971 to May 24, 1971.

Thereafter, by letter dated January 11, 1971, addressed to Victor Trygstad, Esq., of Winthrop, Stimson with a copy to Peter DeFilippi, Esq., Assistant U. S. Attorney, Mr. Blecher of Special Counsel's office informed Winthrop, Stimson that they had begun an exhaustive review of the affidavit submitted by Mr. DeFilippi and the other matters urged by the moving parties during the hearing of November 30, 1970, and had concluded that the results of their review

justified and required the Trustee to seek judicial review of the propriety of the Referee's decision of December 18, 1970. Later, Special Counsel served upon the U. S. Attorney and Winthrop, Stimson a Notice of Application together with an Application for Reconsideration and Rehearing and a Memorandum in Support of the Trustee's Petition for Reconsideration to Approve Compromise. In this memorandum, Special Counsel to the Trustee again urged "in accordance with the appropriate legal standards governing settlement, that the proposed compromise be accepted as a just and reasonable termination of this litigation." A few days before the Notice of Application for Reconsideration and Rehearing was served, the defendants moved in the U.S. District Court for the District of Columbia to schedule a pre-trial hearing on certain damage issues. A pre-trial hearing was subsequently held before that Court, following the submission of statements of position by the defendants and by the plaintiff, to consider the evidentiary issues raised by the creditors' damage analysis referred to in the Referee's decision dated December 18, 1970 and whether such analysis would be admissible into evidence at the trial of the case to establish that Sapphire Steamship Lines was

injured as a consequence of particular acts of the defendants. Special Counsel sent a letter dated February 17, 1971 to the Referee to call his attention to the motion by the defendants, in the District of Columbia proceeding, and enclosing copies of the Motion and moving papers and the proposed Order of the District of Columbia Court. Copies of this letter and enclosures were also sent to the U. S. Attorney, to Winthrop, Stimson and to Counsel for the Trustee. We reviewed the motion and supporting papers and memoranda, and discussed the question of appearance in the proceedings in the District of Columbia Court at the invitation of the defendants, but concluded that there was no necessity for appearance by either the Assistant U. S. Attorney from New York or Winthrop, Stimson at the hearing on the motion pending in the District of Columbia Court. On April 13, 1971 Judge Waddy of the District Court for the District of Columbia issued an order that the DeFilippi loss of revenue study would not be admitted in evidence at the trial of the antitrust action "in its present form." This Order by Judge Waddy was anticipated, as the purpose of the DeFilippi loss of revenue study was merely to demonstrate that the Bankrupt had suffered substantial damage and was not intended to be submitted "in its present form" as evidence admissible at the trial of the antitrust action.

After receiving the Trustee's Application for Reconsideration and Rehearing and Special Counsel's Memorandum in Support of the Trustee's Petition for Reconsideration to Approve Compromise, we made a thorough review of all the papers and data in the pending proceeding, both those filed in the District Court of the District of Columbia in the pending litigation and those filed in this Court in connection with the original Trustee's Application for Approval and the hearing held on September 14, 1970 and our Creditor's Joint Application for Rehearing and the hearing held thereon on November 30, 1970, and made a further intensive and exhaustive study of financial and accounting records and other data available. Winthrop, Stimson conferred with Peter DeFilippi who had just resigned as Assistant U.S. Attorney and with Alan B. Morrison, Mr. DeFilippi's successor in charge of this matter in the Office of the United States Attorney. We again jointly submitted a Memorandum of Law, dated April 16, 1971, in opposition to the Application by Special Counsel for Reconsideration and Rehearing of the Referee's decision dated December 18, 1970, disapproving the \$1,600,000 compromise of the pending antitrust litigation.

In his decision dated May 24, 1971 the Referee granted the Trustee's motion for reargument and upon reargument adhered to his decision of December 18, 1970, dis-

approving the compromise. In his decision, the Referee stated:

"The trustee seeks to punch further holes in its own position in the anti-trust case in order to persuade me to authorize the compromise. These, too, are arguable matters to be determined at the trial of the issues. * * *

"There is no doubt that bankrupt was forced out of business by the conduct of the defendants in the anti-trust action. Safir v. Gibson, 417 F.2d 972, 974, 978 (2d Cir. 1969). There seems little doubt that they suffered a substantial loss of revenue, a portion of which, it seems, can be established through competent witnesses. Further losses, on invested and borrowed capital may well be established as a direct result of the conspiracy.

"In view of these factors, a compromise, which after payment of the fee of special trial counsel and bankruptcy administration expenses would leave nothing for general creditors ought not, in the face of strong objection, be approved." (pp. 6, 7)

(We spent 152 hours on this third stage of the proceedings.)

D. May 25, 1971 to February 2, 1972.

Subsequently, by letter dated June 3, 1971, Special Counsel addressed a letter to the Referee stating:

"Upon consideration of all facts, the undersigned, as special counsel to the Trustee has decided not to appeal to [sic] your decision of May 24, 1971 * * *."

Thereafter, the defendants obtained an Order from the Trial Judge in the District Court for the District of Columbia directing the Trustee to file a petition for review of the Referee's Order disapproving the \$1,600,000 offer in compromise. Under date of June 16, 1971, Counsel to the

Trustee filed a Petition for Review with this Court in which he stated in substance that Petitioner was aggrieved by the Order of HON. ASA S. HERZOG, Referee in Bankruptcy, dated December 31, 1970, denying the application by the Trustee to compromise and settle the action pending in the United States District Court for the District of Columbia where Applicant as plaintiff was seeking to obtain \$12,000,000 for violation of the antitrust laws against a number of defendants who had offered to compromise the action for \$1,600,000; that the disapproval of the proposed compromise was not in the best interest of the Bankrupt estate and that the objectors to the approval of the offer of compromise failed to establish that the proposed offer of compromise of the pending litigation was unreasonable and that the best interest of the Bankrupt estate was not being served in approving said offer of compromise.

Special Counsel filed a Brief of Appellant Trustee in Bankruptcy J. Read Smith, dated July 13, 1971, with voluminous exhibits attached. Attorneys for the defendants submitted a Notice of Motion to Intervene in this bankruptcy proceeding for the limited purpose of presenting written and oral argument in support of the Trustee's Petition to Review and set aside the Order of the HON. ASA S. HERZOG disapproving the compromise, and both "Trade" and "Non-Trade" defendants

submitted lengthy memoranda and exhibits in support of the Trustee's Petition to Review and their Motions for Leave to Intervene.

This new proceeding in the summer of 1971 required us to review again all of the voluminous papers and memoranda, exhibits and documents submitted by Petitioners and Intervenors, to interview at length Mr. Thompsen, Mr. Weissberger and his counsel and to make a further study of the facts and law pertaining to the pending litigation in the District of Columbia and of the prior proceedings in the Bankruptcy Court. We prepared and submitted our Memorandum in Opposition to the Motion for Leave to Intervene. We conferred at length with Alan B. Morrison, Esq., Assistant U.S. Attorney, briefed him on the prior proceedings in this Court and on the status of the pending litigation in the District of Columbia and, together with him, prepared and submitted a Joint Memorandum of Facts and Law in Opposition to the Petition for Review.*

At the hearing before Judge Lasker on Trustee's

Petition for Review, both Special Counsel to the Trustee and

Counsel for the "Trade" and the "Non-Trade" defendants argued

^{*} It should be noted that at this point in the proceeding, as was the cace at all other critical stages, Winthrop, Stimson kept informed the attorneys for those general creditors on whose behalf we were acting and any other attorneys for general creditors who might call to obtain a status report of the proceedings.

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS

at great length in support of the Petition for Review and

for approval of the \$1,600,000 offer in compromise. Mr.

Morrison, Assistant U.S. Attorney, and Mr. Benbow of Winthrop,

Stimson, argued in opposition to the Petition for Review

and in favor of upholding the Referee's decision disapproving
the compromise.

In his decision dated February 2, 1972, Judge

Lasker summarized the facts and the law of the case and then,
in final summary, stated:

"The review of this record, including the proceedings on the original motion to approve the compromise, the motion to reconsider, and the reconsideration itself, demonstrates that the Referee here, nationally recognized as one of the most thoughtful and experienced referees in the country, gave due and diligent consideration to all of these factors. It was not an abuse of discretion on his part to disapprove the compromise, and the petition to review his order is denied." (p. 13)

In addition, Judge Lasker denied the motions of the "Non-Trade" and "Trade" defendants to intervene as parties to the Petition for Review, noting that at the argument on the Petition he had heard their counsel and permitted them to submit a brief on the merits of the Petition but expressly reserving decision as to whether further intervention would be permitted. The decision by the District Court, denying Trustee's petition to review the decision of the Referee and denying the motion of the defendants to intervene, was not appealed.

(We spent 211 hours on this fourth stage of the proceedings.)

E. February 3, 1972 to December 31, 1972.

During the time that the several proceedings described above took place, various counsel for "Non-Trade" and for "Trade" defendants requested opportunities to confer with the Assistant U.S. Attorney to discuss with him the question whether the U.S. Attorney's Office should approve, rather than oppose, the offers of settlement in the amounts of \$150,000 on behalf of the "Non-Trade" defendants, and of \$1,450,000 on behalf of the "Trade" defendants. fendants' counsel urged at these meetings that the priority claims of the United States would be substantially paid, or paid in full, out of the settlement offers aggregating \$1,600,000 and, therefore, the U.S. Attorney's Office should withdraw its opposition to the settlement offers. Both Mr. DeFilippi, the first U.S. Attorney in charge of this matter, Mr. Morrison, his successor, and later T. Gorman Reilly, Mr. Morrison's successor, requested that Winthrep, Stimson be present at these conferences requested by the defendants' counsel. At first, counsel for the defendants objected but, at the insistence of each of the Assistant U.S. Attorneys, withdrew their objections and agreed to representatives of Winthrop, Stimson being present and joining in the discussion of the proposed offers in settlement

under consideration. The Assistant U.S. Attorney, currently in charge of the matter for the United States, desired to have Mr. Benbow and Mr. Trygstad or Mr. Berger of Winthrop, Stimson present at these meetings as these attorneys had spent a substantial amount of time in the investigation and analysis of the facts pertaining to the damages suffered by the Bankrupt; in researching the questions of law pertaining to the alleged violations of the Sherman Act and the Merchant Marine Act of 1936; in extensive interviewing of witnesses; and in preparation of memoranda of facts and law and of exhibits in connection with the several proceedings before this Court. The principal objective of the "Non-Trade" and "Trade" defendants in requesting the conferences with the Assistant U.S. Attorney was to convince him that the best interest of the United States would be served by accepting the offered compromise settlements, which would result in payment of substantially all, if not all, of the Government claims against the Bankrupt, and that he should not be concerned about the question whether non-priority creditors received any amount on account of their claims against the Bankrupt. Each of the successive U.S. Attorneys was of the opinion that the settlement offers totaling \$1,600,000 were grossly inadequate and, therefore,

even though a major portion or all of the Government priority claims might be paid, that the settlement was not fair and reasonable, and should be opposed. Discussions on the merits of the case were had between the Assistant U.S. Attorney and Winthrop, Stimson before these conferences with counsel for the defendants, and Winthrop, Stimson participated in the discussions at these conferences held at the request of counsel for the defendants.

In January 1972, Alan Morrison resigned and was succeeded by T. Gorman Reilly as Assistant U.S. Attorney in charge of this matter. Again, at his request, we briefed the new Assistant U.S. Attorney on the background and facts of the case, analyzing the questions of law, of liability of the defendants, and of damages suffered by the Bankrupt. Shortly thereafter, in March, 1972, Mr. Reilly was informed by counsel for the defendants that they had requested a conference be held in Washington at the office of Mr. Lawrence Ledebur, Chief, Admiralty and Shipping Section of the Civil Division of the United States Department of Justice, and they requested Mr. Reilly to come to Washington to attend this conference. Mr. Alioto was to be present and the purpose of the meeting was to discuss a "sweetening of the pot." Mr. Reilly requested that representatives of Winthrop, Stimson be invited

to be present at this conference and this request was granted. Prior to this conference in Washington on March 27, 1972, Mr. Reilly reviewed the history of the prior proceedings which had been had before this Court in New York, and because of the limited time available prior to the conference requested that Winthrop, Stimson brief him on the proceedings and the information which they had available as a result of their studies and research. Messrs. Benbow, Trygstad and Berger of Winthrop, Stimson reviewed their voluminous files in the matter and made available to Mr. Reilly their binders of documents and evidentiary material which had been built up during the prior proceedings before this Court. Present at the conference in Washington were counsel for all of the defendants, Joseph L. Alioto and his son, Lawrence Alioto, Special Counsel to the Trustee, Robert Sher, their Washington, D.C. associate counsel, Mr. Ledebur, and Mr. Reilly of the U.S. Attorney's Office and Messrs. Benbow and Trygstad of Winthrop, Stimson. At this conference, counsel for the defendants stated that (a) their clients were prepared to increase their offer in settlement from \$1,600,000 to \$2,000,000, (b) Mr. Alioto, as Special Counsel, had agreed to limit his application for fees as Special Counsel to the fees which he would have claimed if the earlier offer of \$1,600,000 had been approved by the Referee, (c) this would leave approximately \$1,500,000 for

the estate of the Bankrupt, and (d) appeared to be sufficient to pay all or substantially all of the Government's priority claims against the Bankrupt. Mr. Alioto, Special Counsel, confirmed that he approved of the revised settlement offer and had agreed to limit his application of fees to the amount which he would have claimed if the \$1,600,000 offer had been accepted. He urged Mr. Ledebur and Mr. Reilly, as representatives of the United States, to approve the \$2,000,000 offer and stated that, in his judgment, this increased offer was extremely favorable to the Bankrupt and should be accepted by the Trustees and approved by the Referee. He added, however, that he would like to get the approval of the U.S. Attorney's Office on behalf of the Government before presenting the \$2,000,000 offer to Counsel for the Trustee for acceptance or to the Referee for approval. The pending litigation was discussed at length and the new offer was analyzed in the light of the damages suffered by the plaintiff, the substantial evidence of liability on the part of the defendants, and the provisions of the antitrust laws and the Shipping Act which applied to the case. Mr. Alioto then stated that, although as Special Counsel to the Trustee he did recommend acceptance of the offer, he was prepared to pursue the litigation in the District of Columbia Court in the event the U.S. Attorney's Office opposed the new offer. At the conclusion

of the discussion, Mr. Ledebur and Mr. Reilly on behalf of the United States Government and Mr. Benbow and Mr. Trygstad on behalf of objecting general creditors, informed counsel for the defendants and Special Counsel that they would not recommend, but would oppose, acceptance of the new \$2,000,000 offer of settlement. They stated they considered the new offer was still substantially inadequate in amount, considering the strong case with respect to liability and their view that the case was also strong with respect to proving substantial damages, and the fact that any damages awarded by a jury would be trebled, plus an award of attorney's fees. They stated their opinions that the facts of the case were so strong and the substantial damages suffered by the Bankrupt plaintiff were so large that a settlement of \$2,000,000 was neither fair nor reasonable and acceptance of that offer would not be in the best interests of the Bankrupt estate.

Later, in the fall of 1972, counsel for defendants requested another conference at the Office of the U.S. Attorney in New York City and Winthrop, Stimson was again requested and invited by the Assistant U.S. Attorney to be present. At this conference, Alfred Rosenberg as Counsel and Lawrence Alioto and Robert Sher, as Special Counsel and Associate Counsel to the Trustee, Terence Benbow and Victor Trygstad of Winthrop, Stimson, and Joseph Spain of Royall Koegel & Wells,

were present as representatives of the Bankrupt plaintiff and its creditors. Counsel for defendants attended to present their views and to renew their offer of \$2,000,000 in settlement. After a lengthy and detailed discussion, Mr. Reilly and Mr. Benbow stated again that they would oppose the proposed offer of \$2,000,000 if it were presented to and accepted by the Trustee. Counsel for defendants then inquired what amount would not be opposed and would be recommended to the Referee for approval by the Assistant U.S. Attorney, or by counsel for the creditors. Mr. Reilly on behalf of the United States, and Mr. Benbow on behalf of objecting creditors, both stated that they would not oppose and would recommend acceptance by the Trustee, and approval by the Referee, of an offer in an aggregate sum equivalent to \$3,500,000 increased by an amount estimated as attorney's fees, as a reasonable and fair measure of single damages, including (a) loss of profits due to the conspiracy and illegal acts of the defendants during the period prior to the bankruptcy of Sapphire, (b) loss of capital resulting from the forced sale of its three ships on the foreclosure of the first mortgage and loss of preliminary engineering and financing costs incurred in developing the proposed containership program of Sapphire, and (c) a relatively nominal amount for loss of future profits which would have been realized by Sapphire from its

containership program if it had not been forced into bankruptcy. Counsel for the Trustee was inclined to go along with this recommendation, but Special Counsel was silent. Counsel for defendants stated that this amount was out of the question and that they would prefer to litigate the case. As the \$2,000,000 offer was not acceptable and as counsel for the defendants were not prepared to increase their offer to an amount approximating the figure mentioned, the meeting broke up with both sides stating that they were prepared to proceed with the litigation. After counsel for the defendants had left the conference room, Counsel, Special Counsel and Associate Counsel for the Trustee, the Assistant U.S. Attorney and Winthrop, Stimson remained and discussed the positions of the two sides at some further length. Both Mr. Rosenberg, Counsel to the Trustee, and Mr. Sher, Associate Special Counsel to the Trustee, expressed the view that, in the light of favorable developments in the pending litigation by reason of additional favorable decisions in other antitrust cases and the decision favorable to Sapphire by the Chief Hearing Examiner of the Maritime Subsidy Board in the pending subsidy proceedings, the decision not to recommend the \$2,000,000 settlement offer was probably correct; that Special Counsel to the Trustee should renew its motion for partial summary judgment on the

matter of liability of defendants and that the plaintiff
Trustee had an excellent chance of now convincing the District
of Columbia Court to grant the motion for partial summary
judgment. At the conclusion of the meeting, all counsel
then present agreed that Special Counsel should proceed
with the litigation and the renewal of the motion for partial summary judgment.

(We spent 451 hours on this fifth stage of the proceedings.)

F. January 1, 1973 to Date.

Early in 1973 the proceedings in the pending litigation were resumed in the United States District Court for the District of Columbia. The defendants filed Motions for Summary Judgment together with a Memorandum in Support of their Motions and in Opposition to Plaintiff's Motion for Partial Summary Judgment, and Special Counsel for plaintiff filed their Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment and a Supplemental Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment on the issue of liability. Copies of these papers were furnished by Special Counsel to Winthrop, Stimson for their information, which were reviewed and studied.

At about the same time, counsel for "Non-Trade" defendants renewed their efforts to arrive at an offer of settlement and compromise of claims against the "Non-Trade" defendants by again contacting Mr. Reilly, the Assistant U. S. Attorney in New York, and inquiring whether a new offer, increasing their first offer of \$150,000 to \$250,000, would be considered favorably by Mr. Reilly. Mr. Reilly conferred with Winthrop, Stimson on the inquiry. After a lengthy review and analysis of the probable liability of the "Non-Trade" defendants, Mr. Reilly and Winthrop, Stimson agreed that the tentative offer of \$250,000 was still inadequate. A conference among counsel for the "Non-Trade" defendants, the Assistant U. S. Attorney and Winthrop, Stimson was later held at which counsel for the "Non-Trade" defendants urged that the \$250,000 offer not be opposed by the Assistant U. S. Attorney, and that the offer would not be submitted to the Trustee for his consideration and acceptance unless and until the Assistant U. S. Attorney indicated he would not oppose the offer. At the conclusion of this conference, both the Assistant U. S. Attorney and Winthrop, Stimson stated they still considered the tentative offer by "Non-Trade" defendants as inadequate and both would oppose the settlement offer if it were accepted by the Trustee and submitted to the Referee for approval.

Shortly thereafter, counsel for the "Non-Trade" defendants contacted Mr. Reilly again and indicated that the "Non-Trade" defendants were willing to increase their settlement offer to \$300,000 if the Assistant U. S. Attorney would not oppose an offer of that amount. Mr. Reilly conferred again with Winthrop, Stimson and the new tentative proposal was reviewed and considered. Both the Assistant U.S. Attorney and Winthrop, Stimson agreed that the tentative offer of \$300,000 was approaching a more realistic amount as a compromise settlement of the liability of the "Non-Trade" defendants, and that acceptance of the offer would place the Bankrupt plaintiff in funds which would enable it to pursue vigorously a continuance of the litigation against the "Trade" defendants who had actively participated in the illegal conspiracy against plaintiff. The Assistant U.S. Attorney decided that he would not actively oppose the tentative offer of \$300,000, and Winthrop, Stimson decided that they would like to consider the offer further and reserve judgment until a firm offer of that amount was submitted to Special Counsel.

Shortly thereafter, counsel for the "Trade" defendants wrote the Assistant U.S. Attorney with a new increased offer of \$2,000,000, including the \$300,000 offered

by the "Non-Trade" defendants, plus payment by the "Trade" defendants of \$473,070.12 to cover the fees and out-of-pocket disbursements incurred by the law offices of Joseph Alioto (including associated counsel) in connection with services rendered for the plaintiff in the litigation. Counsel for the "Trade" defendants stated that they had reached an agreement with Mr. Alioto, which was subject to the approval of the Referee, but stated that before presenting the new offer to the Referee they needed to know whether the Attorney General would recommend acceptance of the new settlement offer. The suggested offer was considered and accepted by the Department of Justice in June of 1973. The offer was presented to the Trustee who agreed to accept it and settlement papers were drawn. Winthrop, Stimson was not informed of this last offer of \$2,473,070.12 until later.

Counsel for the Trustee filed with the Referee

a Petition for Approval of Compromise ("Non-Trade" defendants),
dated May 18, 1973, and upon this application the Referee
ordered a meeting of creditors to be held July 2, 1973 to
consider and act upon the offer by the "Non-Trade" defendants
in the amount of \$300,000. Subsequently, Counsel for the
Trustee submitted to the Referee a Petition for Approval
of Compromise, dated June 25, 1973, in which the Trustee

petitioned for an order approving the settlement offer of the "Trade" defendants in the sum of \$1,700,000 plus the sum of \$473,070.12 for legal services rendered and reimbursement of costs advanced in the litigation by Special Counsel. Counsel for the Trustee submitted also other papers in connection with the application, including a Memorandum in Support of Petition For Approval of Compromise, together with exhibits, and the Petition of Lawrence Alioto, as associate of Joseph L. Alioto, Special Counsel to the Trustee, for allowance of fees. Under date of June 25, 1973 the Referee issued an Order that a meeting of creditors be held before the Referee on the 16th day of July, 1973 to consider and act upon the offer of compromise and settlement by the "Trade" defendants by payment to the Trustee of \$2,173,070.12, inclusive of \$28,070.12 as reimbursement of expenses incurred by Special Counsel, and to act upon the application for allowance of counsel fees to and reimbursement of disbursements of Special Counsel. The two hearings were consolidated and one hearing was held on the offers in settlement in the aggregate amount of \$2,473,070.12.

After receiving notice of these hearings, Winthrop,
Stimson reviewed and studied the various papers submitted in
support of the Trustee's application for approval and reviewed

again the voluminous material on the question of damages suffered by the Bankrupt as a result of the illegal acts of the defendants, in violation of Section 810 of the Merchant Marine Act of 1936 and Sections 1 and 2 of the Sherman Act, and the liability of the "Trade" defendants and of the "Non-Trade" defendants with respect thereto. We also obtained and analyzed the Decision dated April 9, 1973 by the Maritime Subsidy Board, DOCKET NO. S-243 SAPPHIRE STEAMSHIP LINES, INC. v. AGAFBO --Investigation of Alleged Section 810 Violation. We had conferences at our office and also telephone conferences with attorneys for other creditors and informed them of the status of the case and of the favorable developments since the Decision dated February 2, 1972 by Judge Lasker, denying the Trustee's petition to review the Decision of the Referee disapproving the earlier offer of \$1,600,000. We conferred with Mr. Reilly, the Assistant U.S. Attorney and reviewed with him our reasons for opposing this latest settlement offer. Mr. Reilly confirmed that the Attorney General's Office had approved the current settlement offer. The three successive Assistant U.S. Attorneys and we had understood throughout the three-year period that we had coordinated our investigation and analyses of the several settlement offers that there might come a time when one or the other office would possibly cease to oppose, and would approve,

a new offer, and the other office might decide that the new offer was still inadequate in amount.

After further intensive study of the papers and data in connection with prior proceedings and the current status of the litigation in the United States District Court for the District of Columbia, and several long interviews with Mr. Weissberger and a further intensive and detailed analysis of papers and data in connection with the projected containership program and projected future profits of Sapphire, we prepared and filed our Memorandum In Opposition to Petitions for Approval of Compromise dated July 12, 1973, together with Exhibits A through D. After further investigation and concerted effort we prepared and submitted to this Court, at the hearing on July 16, 1973, Exhibits E, F and G to our Memorandum In Opposition, which included the recent Opinion and Order of the Maritime Subsidy Board, Docket No. S-243, dated April 9, 1973, which we had just obtained, and detailed accounting schedules evidencing the loss of projected future profits from Sapphire's containership program, which it was forced to abandon as a direct result of the illegal conspiracy and acts of the defendants. At the hearing before the Referee on July 16, 1973 Mr. Benbow presented oral argument in opposition to the current offer and compromise.

After a thorough review and consideration of all the evidentiary facts in the pending suit in the U.S. District Court for the District of Columbia by the Trustee against the "Trade" and "Non-Trade" defendants, we are of the opinion that the probabilities of a jury reaching a favorable verdict for the plaintiff are excellent if the case is tried, (a) on the question of liability of the defendants for violations of Sections 1 and 2 of the Sherman Act and Section 810 of the Merchant Marine Act of 1936, and (b) on the question of an award of substantial damages exceeding \$2,500,000 which, under the law would be trebled, plus attorneys' fees. We are, therefore, opposed to the current offer of settlement in the amount of \$2,473,070.12 in compromise of the pending litigation and believe it is in the best interest of the Bankrupt estate that this offer under consideration be disapproved.

(We spent 464 hours in this sixth stage of the proceedings.)

G. Total Time Spent By Winthrop, Stimson, Putnam & Roberts on This Matter.

For the information of the Court, we are summarizing below the time which we have spent on this matter during the past approximately three years these proceedings have been pending, which has resulted in an increase of \$873,070.12 in the funds of the Bankrupt (in the event the current

settlement offer is approved) all of which, less attorneys' fees and disbursements and other expenses of administration, will be available for the benefit of general creditors.

Terence H. Benbow	305
Victor S. Trygstad	395
Walter J. Holzka	27
Steven A. Berger	492
John H. Byington, Jr.	24
Bartley Fisher	3
Philip Gordon	79
Richard Harden	204
Timothy Smith	40
	1,769 Hours*

The information summarized above in this memorandum is respectfully presented to the Court for its consideration in determining an award of an adequate, reasonable and fair fee to Winthrop, Stimson for legal services rendered to the estate and disbursements incurred in connection therewith. We now turn to our discussion of the discretionary power and authority of the Referee to award payment of compensation and disbursements to Winthrop, Stimson in this matter, and the reason why we believe that an award of compensation and disbursements to Winthrop, Stimson is proper, given the unique character and circumstances of this case.

^{*} The time spent on this matter was obtained from the daily records maintained by our billing department.

ARGUMENT

POINT I

THE REFEREE HAS THE POWER TO MAKE AN ALLOWANCE TO THE ATTORNEYS FOR CREDITORS FOR THEIR SERVICES WHICH HAVE SUBSTANTIALLY ENHANCED THE BANKRUPT ESTATE

Bankruptcy courts have long recognized the established rule that the provisions of the Bankruptcy Act dealing with the awarding of attorney's fees are not exclusive and that, in appropriate circumstances, it is well within the powers of the bankruptcy court to make such awards as justice and equity might dictate. As was stated in <u>In resemptors</u> Swofford, 112 F. Supp. 893, 895 (D. Minn. 1952):

"The authority of the bankruptcy court to tax attorney's fees as costs, in the absence of statutory authorization, rests in its equitable jurisdiction, and such jurisdiction is expressly invested by Section 2, sub. a, of the Act, 11 U.S.C.A. § 11, sub. a. . . .

"It seems obvious from the very existence of a bankruptcy court's equitable powers that Congress did not intend to provide expressly for all of the court's prerogatives. The failure of Congress to provide expressly for attorney's fees in the instant situation does not, of itself, render a court's use of the equitable doctrine inconsistent with the Act. Nor is this conclusion changed in consideration of the express provisions for attorney's fees found elsewhere in the Act. Those provisions do not purport to deal generally with the allowance of attorney's fees." (Emphasis added)

See also <u>Randolph v. Scruggs</u>, 190 U.S. 533 (1903); <u>Sampsell v. Monell</u>, 162 F.2d 4 (9th Cir. 1947); <u>In re Keystone Realty Holding Co.</u>, 117 F.2d 1003 (3d Cir. 1941); <u>In re Alpine Industries</u>, <u>Inc.</u>, 225 F. Supp. 298 (D. Ore. 1964); <u>In re Cheney</u>,

300 F. 465 (D. Mass. 1924) and 3A Collier on Bankruptcy
¶ 62.03[4] (14th ed. 1972) where in summarizing the principle enunciated in the Supreme Court's decision in Randolph v. Scruggs, it is stated in pertinent part "In reference to the problem involved, the principle of Randolph v. Scruggs may be summed up in two propositions, either one of which has left its mark on the present attitude of the courts (1) Persons who rendered services that proved beneficial to the estate will not be precluded from claiming reimbursement because they were not, at the time, officers of the bankruptcy court. . . " (p. 1411)

It is important to note that the equitable powers invoked by the court in <u>Swofford</u> are not unique to bankruptcy. On the contrary, those powers have often been used by courts generally in making appropriate awards to attorneys whose diligent efforts have resulted in a benefit to parties with whom the attorneys involved did not occupy a formal attorney-client relationship. Moreover, it is clear that the awareness of the exercise of such equitable powers by courts generally served to motivate the <u>Swofford</u> court to make a similar award. Thus the court stated:

"Since a general court of equity in a case where the peculiar circumstances warrant may give attorney's fees as costs without statutory authority, see Guardian Trust Co. v. Kansas City Southern Ry. Co., 8 Cir., 28 F.2d 233, if the circumstances of the present case so warrant, there is no question of this court's authority to tax the attorney's fees. . . ."
112 F.Supp. at 894-5

In the landmark case of <u>Sprague v. Ticonic National Bank</u>, 307 U.S. 161 (1939), Mr. Justice Frankfurter speaking for the Court, stated the proposition thusly:

"Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation . . [I]ndividualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." 307 U.S. at 167.

The doctrine enunciated in <u>Ticonic Bank</u> has been applied by many courts in varying situations, <u>e.g.</u>, <u>Mills v. Electro-Lite</u>, 396 U.S. 375, 393 (1970) (shareholders' derivative action); <u>Fleischmann Corp. v. Maier Brewing Co.</u>, 386 U.S. 714, 719 (1967) (trademark infringement action); <u>U.S. v. American</u> Society of Composers, Authors, and Publishers, 466 F.2d 917, 919 (2d Cir. 1972) (copyright licensing action); <u>Illinois v. Harper & Row Publishers</u>, Inc., 55 F.R.D. 221 (N.D. Ill. 1972) (antitrust action), and most recently by the Second Circuit in Alpine Pharmacy v. Pfizer, et al., (Doc. No. 73-1305, decision dated July 2, 1973) wherein the court stated:

"While it is true that Shapiro did not represent any wholesale-retailer class members, the court's power to make an attorneys' fee award under these circumstances seems clear from Sprague v. Ticonic

National Bank, 307 U.S. 161 (1939), and its progeny. In Ticonic Bank, Mr. Justice Frankfurter recognized the historic powers of the equity court to allow counsel fees and costs to a party whose efforts result in the creation of a fund that benefits others. That equity power was not limited merely because the benefited party did not sue on behalf of the eventual fund beneficiaries."

authorities that the fact that Winthrop, Stimson did not formally serve as counsel or special counsel to the trustee in the prosecution of the antitrust action is not in any way determinative of the instant application. Rather, as the court stated in Alpine Pharmacy and as we will demonstrate in Point II, infra, this court in determining whether to exercise its equitable powers in the instant case, should disregard the formalities of the relationships and should view the matter from the factual standpoint of (1) what efforts have been expended, (2) what are the results of those efforts, and (3) who are the ultimate beneficiaries.*

POINT II

IT IS MANIFEST THAT THE COURT, IN THE EXERCISE OF ITS EQUITABLE POWERS, SHOULD GRANT THE INSTANT APPLICATION

While we recognize that the equitable power to award

^{*} It should be noted that it is of no import whether the benefits derived from an attorney's efforts in a litigated matter are in the form of a judgment after trial or, as in the instant case, an enhanced settlement. Alpine Pharmacy v. Pfizer et al., supra; Kahan v. Rosenstiel, 424 F.2d (3d Cir. 1970); Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959); Philadelphia Electric Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969)

attorney fees must be exercised sparingly in order to effectuate the policy of the Bankruptcy Act to limit the expenses of the estate, the courts are nonetheless uniformly of the belief that the awarding of such fees is appropriate where "a tangible benefit has been conferred on the estate to the advantage of the creditors as a whole." Saper v. John Viviane & Son, Inc., 258 F.2d 826 (2d Cir. 1958). Moreover, where the initiative and diligence of creditors' counsel have brought about such a favorable result, "[i]t is in the interest of good administration in bankruptcy that lawyers who display such interest, energy and ability on behalf of estates . . . should be well paid " In re Cheney, 300 F. 465, 467 (D.Mass 1924). In Cheney, the trustee's counsel expressed the opinion that only a small portion of the interest in a certain trust fund belonged to the bankrupt estate. Counsel for certain creditors disagreed and instituted proceedings which ultimately resulted in a recovery in excess of the amount originally asserted by the trustee. The court, in the exercise of its equitable powers, awarded an attorney's fee to creditors for services rendered to the estate, and in so doing indicated, as stated above, that in such circumstances creditors' counsel should be well compensated.

In determining the applicability of Cheney to the instant case, it must be emphasized that the single most important factual similarity is the difference of opinion between

counsel for the trustee and creditors' counsel. We recognize that a rule which would allow compensation to counsel for creditors without regard to whether their services are being or would have been performed for the benefit of the estate by counsel for the trustee, would result in a duplication of effort and undue expense to the estate. See In re Joslyn, 224 F.2d 223 (7th Cir. 1955). Where, however, as in the instant case, a creditor's counsel disagrees with a course of action being taken by the trustee, his counsel and special counsel, acts upon his disagreement and is instrumental in creating a fund inuring to the benefit of the estate as a whole, an entirely different situation is presented -- a situation, we submit, which clearly justifies the court's exercise of its equitable powers to award compensation to the attorneys whose initiative, experience and efforts resulted in the creation of such a fund. See In re New York Investors, Inc., 130 Fed. 90 (2d Cir. 1942). Other cases recognizing the above stated principle, while denying applications for a fee to creditors' attorneys for failing to meet the appropriate tests, include In re Otto-Johnson Mercantile Co., 48 F.2d 741 (10th Cir. 1931); In re Roadarmour, 177 F. 379 (6th Cir. 1910); In re Alta Vineyards Co., 87 F. Supp. 608 (S.D. Cal. 1949); In re J. A. Rudy & Sons, 30 F. Supp. 8 (W.D. Ky. 1939).

There is yet another factor further demonstrating the propriety of granting the instant application. Although

the present claim is in bankruptcy, our firm's services were actually directed toward the civil prosecution of an antitrust violation. Clearly, the courts in enforcing the policies of the antitrust laws have encouraged alert enforcement of those laws through the payment, on equitable grounds, of attorneys' fees in antitrust actions. See, e.g., Alpine Pharmacy v. Pfizer, supra; Philadephia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969). Accordingly, although we recognize that the bankruptcy court is by no means bound by the policies underlying the antitrust laws, we do think it appropriate for the court to consider those policies when ruling on the proposed settlement of an antitrust action on behalf of the bankrupt, and on all related applications for attorneys' fees.

Finally, since it is the equitable power of the court to which this application is addressed, an additional equitable consideration should be mentioned. It was not only the initiative and efforts of Winthrop, Stimson, as creditors' counsel, but also the initiative and determination of our clients, the Bergendahl corporations, and other objecting creditors for whom we acted as "lead" attorneys, in authorizing and requesting Winthrop, Stimson to initiate and later to continue an investigation of the availability of witnesses and accounting records and evidence of damages

suffered by Sapphire that resulted in the creation of the funi represented by the enhanced portion of the present settlement offers. However, if this application is denied, an anomalous result occurs. Although all general creditors would participate on a pro rata basis in the fund, those objecting creditors who thus helped create this additional fund would end up with a substantially smaller percentage of their claims than the non-objecting creditors, if those objecting creditors alone are required to bear the legal expense which brought about this fund. We submit that this flies in the face of one of the primary purposes of the Bankruptcy Act, which is to bring about equal and not preferential distribution of the bankrupt's assets among its creditors.

POINT III

THE AMOUNT OF THE FEE FOR WHICH WINTHROP, STIMSON IS APPLYING IS REASONABLE, FAIR AND APPROPRIATE

In the <u>Pfizer</u> case, <u>supra</u>, the Second Circuit set forth certain guidelines to be followed by courts in determining the amount of compensation to be awarded as attorney's fees in antitrust actions:

[&]quot;(1) the standing of the counsel at the bar;

⁽²⁾ time and labor spent; (3) complexity of

the litigation; (4) the amount recovered; (5) the responsibility undertaken; (6) the court's knowledge of the amount and quality of the work done; (7) what it would be reasonable for counsel to charge a victorious plaintiff; and (8) whether or not counsel had the benefit of a prior decree in a Government-brought case."

should the court grant the instant application, we urge that in determining the appropriate amount to be awarded, particular emphasis should be placed upon three of the factors suggested by the court in Pfizer, namely, "the responsibility undertaken," "the complexity of the litigation," and "the amount recovered." Using these guidelines for evaluation, an award of attorney's fees of approximately 20 percent of the fund created for the benefit of the entire estate (\$175,000 out of \$873,070.12) is reasonable, fair and appropriate compensation for the legal services we have rendered under the unique circumstances of this case.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the application of Winthrop, Stimson for \$175,000 as attorney's fees for legal services rendered to the estate and \$3,000 for disbursements incurred in

connection therewith should be granted.

New York, New York Dated: August 16, 1973

Respectfully submitted,

1. Calmet.

WINTHROP, STIMSON, PUTNAM & ROBERTS

A Member of the Firm Attorneys for E. Bergendahl Co., Inc. (New York), E. Bergendahl
Co., Inc. (Philadelphia), et al.
40 Wall Street

New York, New York 10005 (212) 943-0700

VICTOR S. TRYGSTAD STEVEN A. BERGER,

Of Counsel

Certificate on Allowances.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

To the Honorable Judges of the United States District Court, Southern District of New York:

I, ASA S. Herzog, Referee in Bankruptcy, in charge of the above entitled case, do hereby respectfully report:

This certificate relates to the application of Joseph L. Alioto, Esq., retained as special counsel to the trustee in bankruptcy herein by order dated November 8, 1967, for the purpose of representing the trustee in the prosecution of a civil anti-trust suit theretofore brought by the bankrupt in the District Court of the District of Columbia, to recover damages resulting from acts by the defendant alleged to be in violation of the Federal Antitrust Laws. The defendants in that action were a number of steamship lines and transport companies. The amount sought to be recovered was \$12 million as treble damages and the gravamen of the action was an alleged conspiracy to fix freight rates and monopolize the trade. After intervention of bankruptcy, the trustee was substituted as plaintiff and authorized to retain Joseph L. Alioto, Esq. in place and stead of the prior attorneys for the plaintiff Patton, Boggs & Blow, Esq.*

When the substitution of attorneys was effected, the trustee entered into a stipulation with the former attorneys for the bankrupt-plaintiff, acknowledging that these attorneys had a possessory lien on the papers and documents in their possession, and that their lien for legal fees in the sum of \$12,360., and disbursements of \$687.54 would be recognized and transferred to the proceeds of any settlement or recovery. This stipulation was approved by

Formerly Patton, Blow, Verrill, Brand & Boggs, and there-tofore, Barco, Cook, Patton & Blow.

Certificate on Allowances

order dated September 29, 1967. In his application for compensation, Mr. Alioto states that from the amount allowed him by this court he will satisfy the lien of Patton, Blow, Verrill, Brand & Boggs, established by said stipulation of September 14, 1967, and order dated September 19, 1967.

However, I read the stipulation to mean that the original attorney's lien be paid by the trustee from the proceeds of the settlement and not by Mr. Alioto from the fee awarded to him. Accordingly, after fixing the amount which I will recommend be awarded to Mr. Alioto, I will deduct the sum of \$13,047.54 representing the amount of the attorneys lien which Mr. Alioto undertook to pay, and I recommend that the trustee be directed to pay that sum directly to the Patton firm from the proceeds of the settlement.

Special Counsel has disclosed that he has agreed to pay 14% of the compensation received by him from this estate to Louis P. Rosenberg, Esq., who is general counsel to the trustee. I can understand how Mr. Alioto, unfamiliar with bankruptcy, could enter into such an agreement. But surely Mr. Rosenberg who has expertise in the field of bankruptcy must have known that he could not accept a forwarding fee, or any fee, from special counsel engaged by the trustee. Mr. Rosenberg's compensation will be determined when the case is concluded and if he rendered any services in connection with the antitrust suit, they will be taken into consideration at that time. But since Mr. Alioto's request for compensation takes into consideration the 14% he intended to pay to Mr. Rosenberg, 14% will be deducted from the fee that is recommended for Mr. Alioto.

Mr. Alioto has also disclosed that he will share his compensation with Sher & Harris, Esqs. and with Robert L. Randick, Esq., who have rendered professional legal services in assisting Mr. Alioto in the prosecution and ultimate settlement of the antitrust litigation. Such

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agreement to share compensation with attorneys who contributed to the services rendered by special counsel is not improper. In setting forth the total number of 6,231 hours, Mr. Alioto's supplemental memorandum included 1,425 hours services rendered by Mr. Randick, and 1,186 hours by Mr. Sher of the Sher & Harris firm.

It will serve no useful purpose to list here a detailed statement of the services rendered. It is a matter of common knowledge how utterly time consuming a civil antitrust suit can be, involving investigation, motions, court appearances and particularly the pretrial depositions which became the very foundation of the case.

The original complaint named some 19 defendants and charged all with violating §§ 1 and 2 of the Sherman Act, and those defendants who received operating differential subsidies during the relevant period with violating §810 of the Merchant Marine Act of 1936. Special counsel was substituted in November 1967 and in December 1968, the plaintiff filed an amended complaint substituting the trustee as party plaintiff. The basis of the complaint was that the defendant steamship lines, as members of a defendant steamship conference, combined and conspired to establish certain unlawful rates and engage in other concerted activity for the purpose of driving the bankrupt from the trade. At that time, bankrupt was an operating steamship line carrying military and other cargo between Atlantic and Gulfport ports in the United States and ports in the United Kingdom and in the Bordeaux-Hamburg range in Europe. The defendants fell into two categories: (a) those serving the same trade routes as bankrupt and thus utilizing the alleged unlawful rates (these were referred to as the "trade defendants"); (b) those who did not serve the same routes and did not utilize the alleged unlawful rates. (These were referred to as the "non-trade defendants.") facts concerning this lawsuit are concisely set forth in

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Judge Lasker's opinion in 339 F. Supp. 119 (1972), which will be referred to hereinafter.

After hundreds of hours of depositions and negotiations an offer of compromise was proposed pursuant to which the "trade" defendants would pay to the trustee the sum of \$1,450,000, and the "non-trade" defendants would pay \$150,000. The trustee petitioned for approval of the compromise and the matter came on for hearing, after due notice to creditors, on September 14, 1972. The trustee, his counsel and special counsel recommended approval of the offer. The United States, by an assistant United States attorney and four attorneys representing substantial creditors appeared and opposed the settlement. The position of special counsel was that plaintiff had a strong case on the question of liability and a very weak case on the question of damages sustained as a result of the illegal rates. Special counsel had brought to New York, a high-priced accountant of national repute who, after examining available records, threw up his hands and stated that he could not possibly testify as to any damages sustained as a result of the alleged conspiracy.

By decision dated September 21, 1970, I approved the compromise and entered an order to that effect on September 29, 1970.

Thereafter, the United States and two creditors jointly, E. Bergendahl Co., Inc. (New York) and E. Bergendahl Co., Inc. (Philadelphia), moved for reconsideration and rehearing. It appeared at the rehearing that the United States had put government accountants to work examining the available books and records, as well as certain reports theretofore unavailable. In the light of the new evidence adduced at the hearing, it seemed to me that proving damages was not quite as hopeless as had first appeared, especially since the Revenue Agents would now be available as witnesses and certain reports furnished

by the Military Sea Transportation Service were now available, as were other witnesses who theretofore were reluctant or otherwise not available.

Consequently, I reversed my original decision in a memorandum dated December 18, 1970, granted the motion for reargument and rehearing, and disapproved the compromise. The trustee's motion for reconsideration of the order disapproving the compromise was denied and his petition to review was dismissed by Judge Las-339 F. Supp. 119.

After disapproval of the offer to compromise, special counsel filed a renewed motion for partial summary judgment in the antitrust action. A prior motion had been denied, but the renewed motion was based on significant developments in applicable case law which occurred since 1968. The defendants filed opposition to the motion and cross moved for summary judgment claiming exemption

from liability under the antitrust laws.

Further negotiations led to new offers of compromise and the trustee again moved for approval. The nontrade creditors now offered to pay \$300,000, and the trade creditors, \$2,173,070.12 (inclusive of \$28,070.12 reimbursement of expenses incurred by special counsel). The combined offers were some \$850,000 more than the amount originally offered. Again the matter came on for hearing after due notice to creditors, and again the two creditors who opposed the first settlement, appeared and vociferously opposed the new offer. But this time, the United States Attorney for the Southern District of New York approved and recommended the compromise, and opposition by the Government was no longer an issue.

By decision dated October 16, 1973, I approved the compromise, and no appeal was taken from the order entered in conformity therewith although the time to ap-

peal has long expired.

Thus, the estate has been enhanced by \$2,473,070.12. Again, not familiar with bankruptcy, Mr. Alioto's nego-

tiations contemplated that the defendants would pay into the estate the sum of \$2 million, and that they would pay directly to Mr. Alioto his fee and disbursements. After it was explained to Mr. Alioto that such practice was violative of the Bankruptcy Act, he promptly agreed that the full amount of \$2,473,070.12 be paid into this estate and that his compensation be fixed by this court.

Mr. Alioto requests compensation in the sum of \$445,000 and reimbursement of expenses in the sum of \$28,070.12. Since this figure included the 14% Mr. Alioto agreed to pay to Mr. Rosenberg, I deduct that 14% from the amount requested, which reduces it to \$382,700. From this sum, I deduct the sum of \$13,047.54 representing the lien for legal services rendered by the substituted attorney who first represented the plaintiff in the antitrust suit. I therefore treat Mr. Alioto's application as requesting compensation in the sum of \$369.626.54, which represents approximately 15% of the amount recovered. On an hourly basis, this averages out at about \$69 per hour.

I consider \$369,626.54 a fair and reasonable compensation for the professional services rendered. Taking into account the usual factors to be considered in arriving at reasonable compensation, the amount requested is certainly at the lower end of the spectrum of reasonable-This circuit has long recognized that where an attorney has by his effort created all or part of the estate, the only realistic course is that he receive a reasonable percentage of the recovery. Rosenberg v. United States (In re Bri-Test Inc.), 242 F. 2d 151 (2d Cir. 1957). This is the so-called "salvage theory" which recognizes that the attorney performs on a contingent basis and that where he is unsuccessful in his efforts, his work would go unpaid. In re Lennox Metal Mfg. Co., 263 F. 2d 891 (2d Cir. 1959); Silver v. Rosenberg, 139 F. 2d 1020 (2d Cir. 1944); Hammer v. Tuffy, 145 F. 2d 447 (2d Cir. 1944). After a thorough review of cases on the point in this and other circumstances, I have come to the view

that approximately 20% of a large recovery-to be varied by time necessary consumed, intricacy of the problem, opposition encountered and skill required and applied—could serve as a workable guide. (See "Fees and Allowances," Connecticut Bar Journal, Vol. XXXVI, Number 3, pp. 374, On that basis, the approximately 15% requested seems eminently fair and reasonable. It should he noted that no opposition to Mr. Alioto's request for compensation has been voiced by creditors.

I recommend that Joseph Alioto, Esq. be allowed compensation in the sum of \$369,626, together with his disbursements of \$28,070.12 when properly documented, payable out of the sums recovered in the aforesaid antitrust suit. I recommend that \$13,047.54 be paid to Patton, Boggs & Blow, Esqs., out of said proceeds in full settle-

ment of their attorneys lien.

Winthrop, Stimson, Putnam & Roberts, Esqs., appeared in these proceedings on behalf of the two creditors E. Bergendahl Co., Inc. (New York), and E. Bergendahl Co., Inc. (Philadelphia). They joined the United States in opposing the first offer of compromise and joined the United States in moving for reargument and rehearing. At the hearing on the second offer, they again appeared and bitterly opposed the compromise. On this occasion, however, as noted hereinabove, the Government withdrew its opposition and recommended acceptance of the second

The Winthrop firm now seeks an award of attorneys fees in the sum of \$175,000, which they point out is approximately 20% of \$873,070.12, the amount by which the first offer was increased. The gist of their argument is that by reason of their strong opposition, the first offer was ultimately disapproved and a new offer made, all of which had the result of enhancing the estate to the extent of some \$873,000. In other words, counsel say that by reason of their efforts, a better offer was obtained and

the estate augmented and that they are entitled to compensation from the estate for their services.

In the first place, I must point out that I reversed my original stand and disapproved the first offer primarily because I was impressed with the evidence produced by the internal revenue agents who were put to work on the case by the Government. The attorney for the creditors cannot take full credit for the disapproval of the first offer.

But more important, Winthrop, Stimson, Putnam & Roberts appeared on behalf of two creditors. They appear as such on the record. At no time were they acting as attorneys or special attorneys to the trustee, nor was any order made authorizing them to act for the trustee in any capacity whotsoever. What they did, they did for their clients; their clients will reap the benefit of their services; they must look to their clients for payment.

It could pave the way to grave abuse, if without being authorized to act by the court, counsel for creditors could look to estates for compensation because in the process of representing and protecting their clients, the estate was incidently enhanced.

It is for precisely that reason that General Order 44 was promulgated by the Supreme Court:

"No attorney for a receiver, trustee or debtor in possession shall be appointed except upon order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession * * *."

This mandate has been carried over into the new Bankruptcy Rules. Rule 215(a) providing:

> "No attorney or accountant for the trustee or receiver shall be employed except upon order of the court * • •."

The courts have consistently ruled that absent an order of the court authorizing his employment, an attorney who renders services to the trustee or for the benefit of the estate is a volunteer who may not be paid from the estate. As early as 1918, in *Matter of David Siegel*, 41 Am. B. R. 753, Judge Learned Hand said:

"Any services rendered by those not authorized by the receiver must be deemed to be on the account of the creditors who undertake them. They are merely volunteered and the estate, even though actually benefited, owes nothing for them. There is no hardship in this, but absolute justice. Any ereditor may apply at any time to the court upon suggestion that the receiver should authorize him to assist, and the court can so direct. But to allow claims to be established for benefits, supposititious or actual, without some initial indication that the services upon which they are based will be the subject of a charge, is wrong in principle and mischievous in application. An estate in the custody of a court is not in need of voluntary services; there is no room for the doctrine of salvage. It is presumably being cared for adequately, and those who seek to impose upon it the benefit of their assistance do so at their own account, unless they secure some consent at the outset."

In Sartorious v. Bardo, 95 F. 2d 387, some 20 years after Siegel, Judge Hand again held that a volunteer cannot be paid from the estate:

"The other services for which the committee asks to be paid are their assistance to the trustee, pendente lite. We have often held that when property is in the hands of a receiver or trustee, he alone will be recognized as its administrator, and he alone will be paid for any services rendered in

the care of the property, in its disposition or in contesting claims. The services of those who choose to help him in these duties, even at his invitation, will be treated as rendered in their several interests alone and not for the estate, unless they present to the court in advance their pretension to represent it, showing some reason why the trustee's unaided efforts will not serve. If the court then recognizes them, they become trustees pro hac vice and can be paid; not otherwise (citing cases)."

The courts have shown no inclination to relax this rule. In *Matter of Porto Rican American Tobacco Company*, 117 F. 2d 599 (2d Cir. 1941), the court said:

"This court has held both under the old Bank-ruptey Act and under section 77B that a volunteer, even if his services have benefited the estate cannot be compensated out of the estate for services which should have been performed by the trustee or his attorney, unless the volunteer is authorized by the court in advance of rendering the service. See Sartorious v. Bardo (C. C. A., 2nd Cir.), 95 F. (2d) 387, 390, which cites the earlier authorities."

I must therefore find that Winthrop, Stimson, Putnam & Roberts, Esqs. must took to their clients for compensation and cannot be allowed any compensation from this estate. I recommend that their application be denied in toto.

Dated: New York, New York February 8, 1974

> ASA S. HERZOG Referee in Bankruptcy

Statement by Winthrop, Stimson, Putnam & Roberts in Connection With Disbursements.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

To:

Hon. Milton Pollack, United States District Court Judge, Southern District of New York.

On February 8, 1974 the Honorable Asa S. Herzog, Referee in Bankruptcy, recommended the award to Joseph L. Alioto, Esq., Special Counsel to the Trustee, and associated counsel, of a fee for their services and reimbursement for their costs when properly documented; and recommended that the application of Winthrop, Stimson, Putnam & Roberts for compensation for their services and reimbursement of their disbursements in this matter be denied in toto.

To document disbursements totalling \$3,108.43 by Winthrop, Stimson, Putnam & Roberts in connection with their opposition to the initial settlement offer of \$1,600,000, which was first approved and, later, upon application of Winthrop, Stimson, Putnam & Roberts and the United States Government, was disapproved by the Referee, resulting in the anti-trust case being settled for \$2,473,070.12, there is respectfully submitted herewith the Affidavit of Terence H. Benbow to which is attached a schedule summarizing the disbursements incurred and paid by Winthrop, Stimson, Putnam and Roberts in this matter.

In the application by Winthrop, Stimson, Putnam & Roberts for attorney's fee for professional services rendered to the bankrupt estate and for reimbursement of disStatement by Winthrop, Stimson, Putnam & Roberts in Connection With Disbursements

bursements in connection therewith, dated August 16, 1973, reimbursement for disbursements in the amount of \$3,000 was claimed. As appears from the attached affidavit and schedule a total of \$3,108.43 was disbursed by Winthrop, Stimson in these proceedings.

Wherefore, we respectfully pray that costs be allowed in the amount of \$3,108.43.

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS
By s/ Terence H. Benbow
A Member of the Firm
40 Wall Street
New York, New York 10005
(212) WH 3-0700

Affidavit of Terence H. Benbow in Support of Statement.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

State of New York, County of New York, ss:

TERENCE H. BENBOW, being duly sworn, deposes and says that:

- 1. Attached hereto and made a part hereof is a summary schedule of disbursements incurred and paid by the firm of Winthrop, Stimson, Putnam & Roberts from September, 1970 to date in connection with its services in successfully opposing the settlement in the amount of \$1,600,000 of the case of J. Read Smith, as Trustee of the Estate of Sapphire Steamship Lines, Inc. (Bankrupt) v. Atlantic & Gulf American Flag Berth Operators, et al., Civil Action 2130-66, (U. S. District Court for the District of Columbia), which had been strongly recommended by Special Counsel to the Trustee, and the final settlement of that case in the amount of \$2,473,070.
- 2. The disbursements summarized in the attached schedule were recorded in the accounting records of Winthrop, Stimson, Putnam & Roberts at the time they were made, and the attached schedule is a true and accurate summary of the disbursements incurred and paid by Winthrop, Stimson, Putnam & Roberts in connection with this matter.

(Sworn to by Terence H. Benbow, March 8, 1974.)

Schedule, Annexed to Affidavit of Terence H. Benbow.

Disbursements incurred and paid by Winthrop, Stimson, Putnam & Roberts from September, 1970 to date in connection with the settlement of the case of J. Read Smith, Trustee v. Atlantic & Gulf American Flag Berth Operators, et al., Civil Action 2130-66 (U. S. District Court for the District of Columbia).

Long distance telephone charges	\$ 205.32
Reproduction charges	1,213.90
Postage	61.61
Meals (in connection with overtime and con-	
ferences among counsel and with witnesses)	402.15
Local transportation and travel expenses	461.50
Wilmer, Cutler & Pickering, Washington, D. C. Expenses in connection with obtaining copies of pleadings, transcripts, motion papers, briefs, exhibits, etc. in the District Court, District of Columbia, for use in this proceeding.	628.52
Costs of obtaining transcripts, copies of decisions and other papers in the Bankruptcy Court, Southern District of New York, for use in this proceeding.	
use in this proceeding.	135.43
Total	\$3 108 43

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of

SAPPHIRE STEAMSHIP LINES, INC.,

67 B 252

Bankrupt. :

OPINION

APPEARANCES:

LOUIS P. ROSENBERG, ESQ.
Attorney for J. Read Smith, Trustee
16 Court Street
Brooklyn, New York

PAUL J. CURRAN
United States Actorney for the
Southern District of New York
By: T. Gorman Reilly, Esq. of Counsel

SHER & HARRIS
Attorneys for Joseph L. Alioto, Esq.,
Special Counsel to the Trustee
888 Seventeenth Street, N.W.
Washington, D.C. 20006

JOSEPH L. ALIOTO, ESQ. Pro Se Special Counsel to the Trustee 111 Sutter Street San Francisco, California 94104 By: Robert A. Radnick, Jr., Esq. and Robert E. Sher, Esq. of Counsel

Appearances (Continued)

SZOLD, BRANDWEN, MAYERS & ALTMAN
Attorneys for Patton, Boggs & Blow (formerly Patton, Blow, Verrill, Brand & Boggs, and theretofore Barco, Cook, Patton & Blow), Former Special Counsel to the Trustee
30 Broad Street
New York, N.Y. 10004
By: Roy Gainsburg, Esq. of Counsel

WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for E. Bergendahl Co., Inc. (New York) and E. Bergendahl Co., Inc. (Philadelphia), Creditors
40 Wall Street
New York, N.Y. 10005
By: Terence H. Benbow, Esq.
Victor S. Trygstad, Esq. and
Steven A. Berger, Esq. of Counsel.

MILTON POLLACK, District Judge.

MILTON POLLACK, District Judge.

In this bankruptcy, a specific fund of \$2,473,070.12 has been brought into the Estate through a settlement of an anti-trust action prosecuted for the benefit of the Estate. The present issue relates to allowances of compensation to be assessed for creation of the fund and paid by the Estate to those whose services are said to have brought about the benefit, in whole or in part.

On February 8, 1974, the Bankruptcy Judge [Referee in Bankruptcy, heretofore] issued a Certificate on Allowances recommending to this Court that fees and disbursements be awarded herein to Joseph L. Alioto, Esq. and his predecessor who acted as Special Counsel to the Trustee. The recommended fee is \$369,626 and the disbursements are \$28,070.12. The Bankruptcy Judge has recommended against a claim for an allowance to Winthrop, Stimson, Putnam & Roberts, Esqs. who represent two creditors herein and claim to have contributed substantially to the creation of the fund in Court. The Bankruptcy Judge seemingly doubted that he had power to recommend any award to them and said they "must look to their

clients for compensation and cannot be allowed any compensation from this estate", citing among other authority, Sartorius v. Bardo, 95 F.2d 387 (2d Cir. 1938) (L. Hand, C.J.).

The Bankruptcy Judge also disallowed compensation at this time to the attorneys for the Trustee for services related to the creation of this fund, on two grounds:

(1) that a payment for such services by the Special Counsel for the Trustee out of his allowance would be legally improper and a sharing agreement therefor could not be honored, and (2) that the Trustee's "compensation will be determined when the case is concluded" and any services rendered in connection with the anti-trust suit will be taken into consideration at that time.

It appears that the Bankruptcy Judge did not give effect to overriding equitable principles which are applicable to the special facts herein that require payment of compensation for services rendered for the benefit of all creditors as a class. Moreover, again on equitable principles, an interim allowance to the Trustee's counsel payable out of the particular fund could and in these

circumstances preferably should also have been considered at this time apart from any separate ultimate claim for other general services as attorneys for the Trustee to be evaluated when the case is concluded. The true value of such services can be gauged without waiting for the termination of the proceedings generally. The determination of the net recovery for the Estate, net of the fees and disbursements payable for the creation of the fund, ought reasonably be related to and be a current part of the settlement itself as a matter of judicial husbandry. Since the overall allowances payable for the creation of a fund must be viewed as against the amount of the benefit, all applicable claims for fees properly assessable in relation to the benefit ought to be determined at the same time and in the perspective of the grand total to avoid any distortion that might arise from separate or staggered determinations.

The prior proceedings in this matter so far as pertinent here were as follows.

Prior to bankruptcy, Sapphire Steamship Lines,
Inc. instituted an anti-trust action to recover \$12-million

as treble damages from a number of steamship lines and transport companies, for alleged violation of the antitrust laws by alleged conspiracy to fix freight rates and monopolize the trade. After bankruptcy intervened the Trustee was substituted as plaintiff, and was duly authorized by court order to retain Joseph L. Alioto, Esq. as Special Counsel to the Trustee to prosecute the action. After considerable procedure, an offer was received in about July 1970 to compromise the action for a total of \$1,600,000. Upon due notice to creditors of a hearing to consider the proposed compromise and over the objec- . tion of a number of creditors as well as the United States Attorney on behalf of the government, the Referee in Bankruptcy entered an order dated September 29, 1970 authorizing the Trustee to compromise the action by accepting \$1,600,000 and authorizing him to execute all the necessary legal documents to consummate such a settlement.

In support of the settlement proposed, the Special Counsel to the Trustee furnished a report letter of July

16, 1970 to the Trustee's attorncy stating among other

that the settlement agreements entered into with the defendants in this litigation represent a fair and favorable settlement of the Bankrupt's outstanding claims against said defendants. We, therefore, request that you seek the Court's approval of these agreements."

The Referee's decision approving this compromise dated September 21, 1970 recited, inter alia,

Special counsel has given what I find to be adequate reasons to doubt the probability of success, or even if successful, that a judgment would exceed \$1,600,000, especially in the district where the action is pending.

The only thing which has given me pause, is the views of the creditors. I would indeed like to honor those views if I could find justification therefor. But I can find no such justification ... It seems to me that in this instance I must exercise an independent judgment based upon the full and complete disclosures made by the trustee and his special counsel, albeit my conclusion is at variance with the wishes of the objecting creditors. I therefore accept the recommendation of the trustee, his general counsel, and his special counsel, and I approve the compromise.

Thereafter, the United States of America and two creditors in this proceeding, the Bergandahl companies, objected to the compromise and jointly moved for re-

consideration of the Referee's order of September 29,
1970 and for a rehearing on the proposed compromise.
Opposing this application, the Special Counsel's partner
filed an affidavit reciting that "I see nothing in this
presentation which is new or which alters my strong
conviction that this is a favorable settlement offer
which should be accepted by the Trustee ... I am
certain that if attorneys from their offices familiar
with anti-trust cases were to devote the time required
to make a full study of this case, as we have done,
they, too, would conclude that this is an excellent
settlement."

On the basis of the analyses and presentation of those moving for a rehearing, the Referee found however, that "This now paints an entirely different picture from that presented when the compromise first came on for hearing." The Referee granted the motion for reconsideration and thereupon disapproved the compromise and vacated his order of September 29, 1970. Objecting to this rejection of the compromise, the Special Counsel to the Trustee and the attorney for the Trustee moved for re-

consideration and rehearing. They contended that the Referee had applied an erroneous legal standard in rejecting the proposed compromise and had erroneously accepted as factually correct the representations contained in the creditors' papers and the conclusions based thereon. The Special Counsel again set out his reasons at length for approval of the \$1,600,000 compromise offer.

In a decision dated May 24, 1971, the Referee adhered to his decision of December 18, 1970 disapproving the compromise. The Referee stated:

... a compromise, which after payment of the fee of special trial counsel and bankruptcy administration expenses would leave nothing for general creditors ought not, in the face of strong objection, be approved.

Special Counsel then advised the Referee that he had decided not to appeal this decision "Upon consideration of all facts".

However, the defendants in the anti-trust law suit obtained an order from the trial judge in the District in which the suit was pending directing the Trustee to file a petition for review of the Referee's

order of disapproval of the \$1,600,000 offer in compromise.

Accordingly, under date of June 16, 1971, counsel to the

Trustee filed a Petition for Review and a supporting

brief by the Special Counsel with this Court in which

they stated in substance that Petitioner was aggrieved

by the order of the Referee denying approval of the

compromise; that disapproval was not in the best interest

of the Bankrupt Estate and that the objectors had failed

to establish that the compromise was unreasonable and

not in the best interests of the Estate. On review,

Judge Lasker of this Court ruled that "It was not an

abuse of discretion on his [the Refcree's] part to dis
approve the compromise, and the petition to review his

order is denied."

The opponents of the first settlement offer and the government and the Special and general counsel for the Trustee thereafter put their collective shoulders to the wheel, and as the case progressed closer to actual trial, new negotiations yielded a 50% increase in the amount of the disapproved offer in compromise.

In 1973, an offer was presented to the Trustee for a settlement involving a total of \$2,473,070.12. This was made up of three components; \$1,700,000 was to be paid by the "Trade" defendants, \$300,000 was to be paid by so-called "Non-Trade" defendants and the "Trade" defendants were to pay Mr. Alioto and associates their fees and expenses of \$473,070.12. A petition was filed with the Referee for approval of the offer as thus cast by the proponents. The Referee issued two orders; one, upon the Trustee's petition under date of May 18, 1973 ordering a meeting of creditors to be held on July 2, 1973 to consider and act upon the offer by the "Non-Trade" defendants, in the amount of \$300,000; the other, under date of June 25, 1973, ordering a meeting of creditors to be held before the Referee on July 16, 1973 to consider and act upon the offer of compromise and settlement proposed by the "Trade" defendants, viz., the sum of \$1,700,000 plus \$473,070.12 for legal services and disbursements. The two hearings were consolidated.

Although the Special Counsel had negotiated for a fee to be paid by third parties separately from the amount of the payment into the Estate, upon being advised by the



Referee that such practice was violative of the Bankruptcy

Act, the Special Counsel had agreed that the full amount

of \$2,473,070.12 be paid into the Estate and that his

compensation be fixed by the Court.

In a decision dated October 16, 1973 the Referee approved the new proposals of settlement which enhanced the Bankrupt Estate by \$873,070.12 over the settlement that had been negotiated in 1970. Although there was opposition to the 1973 proposals of settlement, no appeal was taken thereafter by anyone from the Order entered in conformity with the Referee's decision and the time to appeal has expired.

of compromise and throughout the proceedings in the following years the firm of Winthrop, Stimson, Putnam and Roberts undisputably rendered services innuring to the benefit of the creditors of the Bankrupt Estate as a class and which contributed to the enormous enhancement of the Estate that was achieved. No measurement of their contribution or its value has been made by the Bankruptcy Judge in his Certificate.

The Referee has passed upon the application of Joseph Alioto, Esq. and his predecessor and has recommended compensation to them described as approximately 15 percent of the

total amount recovered. Winthrop, Stimson, Putnam & Roberts, Esqs., who appeared on behalf of the Bergandahl companies, sought an award for their services of \$175,000 and disbursements of \$3,000, or approximately 20% of \$873,070.12, the amount by which the offer objected to was increased. The Referee rejected their application, stating that these attorneys cannot take full credit for the disapproval of the first offer because the Referee was impressed with evidence produced by Internal Revenue Agents who were put to work on the case by the government (more properly a factor to be weighed in ascertaining the size of a fee) and moreover, as a matter of law, that since these attorneys were not acting as attorneys or special attorneys to the Trustee nor had any order been made authorizing them to act for the Trustee in any

^{1/} It should be noted that, at one point, Special Counsel agreed to limit his application for fees to the fees which he would have claimed if the earlier offer of \$1,600,000 had been approved by the Referee. Apparently, he later withdrew this concession when it became manifest that he would be required to participate in the rendition of additional services.

capacity whatsoever, "what they did, they did for their clients; their clients will reap the benefit of their services; they must look to their clients for payment."

The Referee cited General Order 44 promulgated by the Supreme Court and New Bankruptcy Rules 215(a), 411 U.S. 989, 1036 (1973), both providing that "No attorney or accountant for the trustee shall be employed except on order of the court," and In re Siegel, 41 Am. Bankr. R. 753 (S. D.N.Y. 1918) (L. Hand, D.J.), and Sartorius v. Bardo, 95 F.2d 387 (2d Cir. 1938) (L. Hand, C.J.).

Unquestionably, the services of Winthrop, Stimson,

Putnam & Roberts went beyond their representation of the

interests of individual creditors. The values ultimately

recovered for the Estate over the resistance of the

Special Counsel as well as the Trustee and over the

initially approved compromise of \$1,600,000 went enormously

beyond what the Special and general Attorneys for the

Trustee had accomplished for the Estate. The government

^{2/} The record contains a number of affidavits of support for Winthrop, Stimson's fee application from creditors who would equitably bear the burden of any fee awarded to Winthrop, Stimson. There is no opposition to such an award on the record before the Referee, or before this Court.

has acknowledged the important association of the Winthrop, Stimson firm in the opposition to the initial settlement and the creation of the new settlement. Yet, seemingly, the Special Attorney for the Trustee alone has benefited fee-wise from the increase since he has been allowed a percentage against the entire total.

(See footnote | supra). Fees to others responsible in various measures for the enhancement have been rejected or deferred on grounds that do not appear equitable in the special circumstances here.

The test for the granting of any allowance should usually be whether the services for which compensation is sought have been of benefit to the Estate in its conservation or administration. This includes all expenses of realizing property for the Bankrupt. The Court is empowered to allow reasonable compensation and reimbursement for expenses to parties and interests, including representatives of creditors where, as here, the services go far beyond what could be ascribed to the protection of individual creditor's interests.

Where lawyers through action on behalf of all the

members of a class of interested parties contribute services through which a fund is realized for distribution to the members of that class, they are entitled to an allowance out of the fund so created on the theory that those who accept the benefits of such services must also assume a share of the expenses connected therewith. This rule is also applicable in bankruptcy. Such allowances are to be made as part of the Court's authority to do equity in a particular situation. Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). Here the objections to the initially approved settlement resulted in an additional fund of well over \$800,000. It would be inequitable as well as unrealistic to say that this result was compensable to the objecting attorneys only by the two creditors whom they represented and whose equitable interest in the benefit was only a small fraction thereof.

Although the "general American rule" is that attorneys' fees are not ordinarily recoverable as costs,

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391 (1970),
there are recognized "exceptions to this rule for situa-

tions in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit ... that benefits a group of others in the same manner as himself.... To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly as the plaintiff's expense." Id. at 391-92. (footnote omitted) (citation omitted).

The most common application of this principle is to cases where the efforts of one party "result in the creation of a fund that benefits others." Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1057 (2d Cir. 1973), citing Sprague v. Ticonic National Bank, 307 U.S. 161, 167 (1939); accord, United States v. American Society of Composers, Authors and Publishers, 466 F.2d 917, 919 (2d Cir. 1972); Nolte v. Hudson Nav. Co., 47 F.2d 166 (2d Cir. 1931) (L. Hand, Swan & Chase, C.JJ.). Moreover, this concept is not alien to the field of bankruptcy. See In re New York Investors, Inc., 130 F.2d 90 (2d Cir. 1942)

(L. Hand, A. Hand & Clark, C.JJ.).

reluctance to allow the assessment of any fees and costs in bankruptcy proceedings which are not expressly authorized by the Act, or that are not well established by judicial precedent.... And as a general rule no compensation or reimbursement can be had unless a tangible benefit has been conferred on the estate to the advantage of the creditors as a whole, "Saper v. John Viviane & Son, Inc., 258 F.2d 826, 828 (2d Cir. 1958) (emphasis supplied), although "these principles are not without exceptions." Id. In the present case, there is no question but that a tangible benefit has been conferred on the Estate as a whole.

Accordingly, the Bankruptcy Judge's reliance upon the fact that Winthrop, Stimson was never expressly authorized to act as attorney or Special Attorney for the Trustee is misplaced, especially in light of Justice Frankfurter's injunction that "when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation ... hardly touch the

power of equity in doing justice as between a party and the beneficiaries of his litigation." Sprague v.

Ticonic National Bank, supra, at 167; accord, United

States v. American Society of Composers, Authors and

Publishers, supra at 919 (attorneys not foreclosed from recovery on their claim because of the absence of any formal indications that they prosecuted the action as a class action); Alpine Pharmacy, Inc. v. Chas. Pfizer

& Co., supra, at 1057 (fact that "adversary" counsel did not sue on behalf of class for whose benefit he created a fund presents no bar to allowance out of that fund). As the Court of Appeals has recently observed

"[t]he relevant factor is the creation of the fund, not what Justice Frankfurther [sic] termed 'the formalities of litigation.'" Alpine Pharmacy, supra, at 1057.

a matter of law that it was without the power, denied the petitioners a right they had to have it exercise its discretion in the matter of whether or not to make an allowance." Nolte v. Hudson Nav. Co., supra. at 167 The Bankruptcy Judge felt himself bound by "the prior approval

Tobacco Co., 117 F.2d 599 (2d Cir. 1941). However, that requirement is to be omitted "[w]here the creditor has not unnecessarily duplicated the efforts of others, and where his services are such as the trustees cannot reasonably have been expected to perform..." In re

New York Investors, Inc., 130 F.2d 90, 92 (2d Cir. 1942);

accord, Sartorius v. Bardo, 95 F.2d 387, 390 (2d Cir. 1938).

The right of counsel to the Trustee to receive interim compensation, independently, for his conceded services in relation to the recovery has not been determined. Since the aspect of this case in respect to the antitrust suit is now being concluded, the creditors are entitled now to know what the net benefit will be to the Estate. That requires admeasurement now of any fee due to the Trustee on the anti-trust recovery. In re Casco Pashions, Inc., 346 F. Supp. 1252, 1255 (S.D.N.Y. 1972).

Cf. In re Paramount-Publix Corp., 10 F. Supp. 504, 510 (S.D.N.Y. 1934).

In admeasuring a fee against a fund created for the benefit of a class, it is preferable that all those

equitably entitled to be compensated should be considered at the same time to avoid any individual or overall distortions. Cf., e.g., In re National Discount Corp.,

211 F. Supp. 261, 262 (W.D. S.C. 1962); In re Tapp,

65 F. Supp. 171, 173 (W.D. Ky. 1946); In re Wallace,

14 F.2d 534 (E.D. Okla. 1926); In re Falkenberg, 206

F. 835 (D. N.M. 1913).

Accordingly, the Bankruptcy Judge should, at the same time, reconsider the relative contributions of the Special Attorney and the Regular Attorney for the Trustee and the attorneys for the objecting creditors and such compensation as is fair and reasonable for the services of each in the creation of the fund in Court and as is reasonable overall and in relation to each other should be allowed payable out of the settlement fund.

The recommendation of the Bankruptcy Judge on
the allowances to be paid from and by reason of the
creation of the settlement fund is remanded to the
Bankruptcy Judge for further proceedings, not inconsistent with this opinion, on such notice to creditors as

98a

OPINION

may be required in the premises.

SO ORDERED.

March 15, 1974

Milton Pollack

U.S. District Judge

STIPULATION SUPPLEMENTING RECORD ON APPEAL. UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

:

In the Matter

-of-

STIPULATION SUPPLEMENTING

RECORD ON APPEAL

SAPPHIRE STEAMSHIP LINES, INC.,

Bankrupt. : No. 67-B-252

IT IS HEREBY STIPULATED AND AGREED that, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, the Record on Appeal in the above-entitled action filed with the United States Court of Appeals for the Second Circuit on April 25, 1974 (Docket No. 74-1533) be supplemented by the inclusion of the following documents (which are attached hereto as Exhibits 1 through 7 respectively, and made a part hereof):

- Affidavit, with exhibit, of Emil A. Kratovil, Jr., dated March 1, 1974.
- Affidavit, with exhibit, of David Jaffe, 2. dated March 1, 1974.
- Affidavit, with exhibit, of Joseph H. 3. Spain, dated February 27, 1974.
- Affidavit, with exhibit, of David P. 4. Dawson, dated March 4, 1974.
- Affidavit of Peter R. De Filippi, dated 5. February 28, 1974.
- Affidavit of Stephen Thaler, dated 6. March 4, 1974.

100a

STIPULATION SUPPLEMENTING RECORD ON APPEAL

Memorandum of Winthrop, Stimson, Putnam
 Roberts In Support of Its Objections
 to the Referee's Certificate on Allowances,
 dated March 4, 1974.

Dated: New York, New York May 8, 1974

WINTHROP, STIMSON, PUTNAM & ROBERTS

A Member of the Firm

40 Wall Street New York, New York 10005

Louis P. Rosenberg

Counsel for the Trustee 16 Court Street Brooklyn, New York 11201

EXHIBIT 1, ATTACHED TO STIPULATION. ITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YOR	OUTHERN	DISTRICT	OF	NEW	YOR
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In the Matter

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-of-

AFFIDAVIT OF EMIL A. KRATOVIL, JR.

SAPPHIRE STEAMSHIP LINES, INC., : No. 67-B-252

Bankrupt.

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

EMIL A. KRATOVIL, JR., being duly sworn, deposes and says:

- I am an attorney at law, associated with the firm of Haight, Gardner, Poor & Havens, attorneys for Mathiasen's General Cargo Service, Inc. Our client has a claim in the amount of approximately Ten Thousand Dollars (\$10,000) against the bankrupt's estate. I am submitting this affidavit in support of the application for a compensation by the firm of Winthrop, Stimson, Putnam & Roberts from the estate of the bankrupt for extensive and excellent services which it has rendered in successfully opposing the original settlement offers totaling One Million Six Hundred Thousand Dollars (\$1,600,000) and the final settlement of the antitrust case in the District of Columbia for the aggregate amount of Two Million Four Hundred Seventy-three Thousand Dollars (\$2,473,000).
- 2. On August 29, 1973 I wrote a letter to the Honorable Asa S. Herzog, Referee in Bankruptcy, in support of

EXHIBIT 1, ATTACHED TO STIPULATION

Winthrop, Stimson's application for a fee. A copy of that letter is annexed to this affidavit and is made a part hereof.

3. We believe that the efforts of Winthrop, Stimson were a very important and vital factor in the antitrust case being settled in the amount of Two Million Four Hundred Seventy-three Thousand Dollars (\$2,473,000) instead of in the amount of One Million Six Hundred Thousand Dollars (\$1,600,000) which was the amount urgently recommended by special counsel to the trustee and accepted by the trustee and special counsel. We believe that this court should award Winthrop, Stimson a fee for their services and that this fee should be commensurate with the value of the services rendered by them.

/s/ Emil A. Kratovil, Jr.
Emil A. Kratovil, Jr.

Sworn to before me on this 1st day of March, 1974

/s/ Linda M. Wilkens
Notary Public

(Notary Stamp)

HAIGHT, GARDNER, POOR & HAVENS ONE STATE STREET PLAZA NEW YORK, N.Y. 10004

TELEPHONE (212) 344-6800

CABLE: MOTOR NEW YORK RCA TELEX: 222974 WUI TELEX: 620362 WU TELEX: 127663

1.4,400 20, 1973

WASHINGTON OFFICE FEDERAL BAR BUILDING IBIS H STREET, N.W. WASHINGTON, D. C. 20008

TELEPHONE (202) 737-7647 CABLE: MOTOR WASHINGTON WASHINGTON WU TELEX 682896

RALPH E. CASEY

GLENN BAUER HEODORE M. SYSOL IOLLIS M. WALKER, JR. EROY S. CORSA ARROLL E. DUBUC 15 1 11 11 11

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J WARD O'NEILL
BERNARD D ATWOOD
JAMES M ESTABROOK
DWARD M MAHLA
JOHN C. MOORE
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JOHN OSNATO, JR.

JOHN OSNATO, JR.
WILLIAM J. JUNKERMAN
FORDON W. PAULSEN
4. E. DEORCHIS
WILLIAM P. KAIM, JR.
ANID P. M. WATSON
HICHARD G. ASHWORTH
IDWARD L. JOHNSON
HICHARD B. BARNETT
HAURICE L. NOYER
JANFORD C. MILLER
HARLES S. MAIGHT, JR.
RANCIS X. BYRN
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Our wish to see the regulation on manufaction can elient time our wish to see the regulate and represent to compensation paid to lead counsel in technique on timer secondarial initiative in opposing settlement offers to unto it and no way intermed to derogate our client a line the continues of bolicos to the present settlement offers. Our allowed permanent median results

2-The honorable Asa S. Herzog

with major unsecured creditors, and with the bankrupt's principal Mr. Marshall Safir himself, in strenuous objection to acceptance of a settlement offer where Special Counsel, in recommending that offer, admit upon oral argument that the case is a particularly strong one on its liability aspects; and yet advance nothing by way of explanation of their failure to contact in any way the bankrupt's Treasurer concerning detailed documentary proof under his control tending to show far greater damages than are taken into account by the settlement proposal now before Your Honor.

while we therefore strongly oppose the current settlement offer, we wish to advise (in the event it is nonetheless approved) that we have no objection to Your Honor's award of a fair and reasonable fee to Messrs. Winthrop, Stimson from the estate, in recognition of the services rendered by them to the escate thus far.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS Attorneys for Creditor Mathiasen's General Cargo Service, Inc.

BY

Emil A. Kratovil, Jr.

EAK. br

bcc: Samuel Marks, Esq.

James F. McMullan, Jr., Esq.

Terrence H. Benbow, Esq.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter :

AFFIDAVIT OF

DAVID JAFFE

-of-

SAPPHIRE STEAMSHIP LINES, INC., :

No. 67-B-252

Bankrupt. :

STATE OF NEW YORK)

. 88.:

COUNTY OF NEW YORK)

DAVID JAFFE, being duly sworn, deposes and says:

1. I am a member of the firm Schulman, Abarbanel & Schlesinger with offices at 1250 Broadway, New York, New York 10001. We represent four trusts associated with Seafarers International Union of North America -- Seafarers Welfare Plan, Seafarers Vacation Plan, Harry Lundeberg School of Seamanship and Andrew Furuseth Foundation, which trusts are unsecured creditors in this proceeding with claims aggregating approximately One Hundred Fifty Thousand Dollars (\$150,000). I submit this affidavit in support of the application by the law firm of Winthrop, Stimson, Putnam & Roberts for an allowance of counsel fees for services rendered in connection with the compromise settlement of an antitrust action in which the trustee in bankrupt was plaintiff in the United States District Court for the District of Columbia.

- 2. I have previously written a letter to Referee
 Herzog on behalf of our clients, the four above-named trusts, in
 support of the application for fees of Winthrop, Stimson, Putnam
 & Roberts. Annexed hereto as an exhibit and made a part hereof
 is a copy of that letter.
- We believe that the award of a fair and reasonable fee to Winthrop, Stimson is definitely in order as that firm is largely responsible for an increase of approximately Eight Hundred Seventy-three Thousand Dollars (\$873,000) in the final settlement of the antitrust litigation. In brief, the diligence and expertise of Winthrop, Stimson in inve tigating and analyzing facts and in contacting key witnesses; their initiative in determining that an application should be made for reconsideration of the Referee's first order approving the initial settlement offer aggregating One Million Six Hundred Thousand Dollars (\$1,600,000), acceptance and approval of which special counsel urged vigorously; their subsequent search for, and analysis of, additional facts; and their preparation of memoranda and supporting exhibits in connection with the later proceedings when special counsel for the trustee and the highly skilled attorneys for the defendants unsuccessfully attempted to obtain a reversal of the Referee's second decision disapproving the One Million Six Hundred Thousand Dollars (\$1,600,000) compromise, in addition to the other valuable

services performed by them in this matter, were all material and essential factors in bringing about the final settlement in the aggregate amount of Two Million Four Hundred Seventy-three Thousand Dollars (\$2,473,000) whereby the bankrupt estate has been very substantially enhanced.

4. We urge the court to direct the award of a fee to Winthrop, Stimson as compensation for the substantial time which they have expended on this matter and the successful results which were attained.

S/S David Jaffe
David Jaffe

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Sworn to before me this lstday of March, 1974

S/S Arthur Abarbanel
Notary Public

[SEAL]

SCHULMAN. ABARBANEL & SCHLESINGER

1250 BROADWAY . NEW YORK, N. Y. 10001 . (212) 279.9200

HOWARD SCHULMAN ARTHUR ABARBANEL JACK L KRONER 11925 - 1970! BENJAMIN SCHLESINGER DAVID JAFFE D. NICHOLAS RUSSO ZACHARY WELLMAN

August 10, 1973

The Henorable Asa S. Herzog Referce in Bankruptcy United States District Court for the Southern District of New York United States Court House Foley Square New York, New York 10007

> Re: Matter of Sepphire Steamship Lines, Bankrupt No. 67-R-252

Dear Referee Herzog:

We represent four trusts associated with Seafarers International Union of North America -- Seafarers Welfare Plan, Seafarers Vacation Plan, Harry Lundeberg School of Seamanship and Andrew Furuseth Foundation. Those trusts are unsecured creditors in this proceeding with claims aggregating approximately \$150,000,00. tollars.

For the past few years the firm of Winthrep, Stimen, Putnam & Roberts has been acting as unofficial coordinator or lead counsel for the principal unsecured creditors. We associate ourselves with that firm's strong opposition to the proposed settlement of the antitrust action in the sum of approximately \$2,400,000.00. It seems to us that, upon the trial of the action, such a sum is the minimum amount which might be recovered and that the prespect for recovery of millions more, even excluding the possibility of recovery for future profits, is indeed bright.

In the event, however, that Your Honor approves the proposed settlement, we believe that the award of a fair and reasonable fee to the Winthrop, Stimson firm from the bankrupt estate is surely in order. That firm is largely responsible for the greatly increased, though we believe still inadequate, settlement offer. The diligent efforts of that firm in investigating newly discovered facts and contacting key vitnesses, an arduous and time-consuming process, should not go unrewarded. The bankrupt estate has already been substantially enhanced by those efforts.

Respectfully yours,

SCHULLMAN ABARDANEL & SCHLESINGER

3

By:

David Jaffe

M: LO

bc: Joel C. Glanctein, Esq. (with enclosures)
Zwerling & Zwerling, Esq. (" ")
Att. Martin Kent, /

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In the Matter

AFFIDAVIT OF

-of-

JOSEPH H. SPAIN

SAPPHIRE STEAMSHIP LINES, INC., : No. 67-B-252

Bankrupt.

STATE OF NEW YORK) ss.: COUNTY OF NEW YORK)

JOSEPH H. SPAIN, being duly sworn, deposes and says:

I am a member of the firm Rogers & Wells, attorneys in this proceeding on behalf of Allied Van Lines, Inc. Our client is one of the larger general creditors of the bankrupt. I make this affidavit in support of the position taken herein by the law firm of Winthrop, Stimson, Putnam & Roberts that said firm should be awarded compensation from the bankrupt's estate in consideration of the services which it has rendered on behalf of the estate in connection with the settlement of the District of Columbia antitrust case against the AGAFBO defendants.

When the matter of fees was before Bankruptcy

Judge Herzog, I wrote a letter to him on behalf of Allied

Van Lines, and in support of Winthrop, Stimson's application

for fees. A copy of that letter is annexed to this affidavit

as an exhibit, and is made a part hereof.

Our position, and that of our client, in support of Winthrop, Stimson's fee application remains the same. We believe that this Court should direct the award of fees to it, because its efforts were certainly the most important and significant factor in the case settlement's being increased from approximately \$1.6 million to \$2.4 million.

Joseph H. Spain

Sworn to before me on this 27th day of February, 1374

Notary Public

SIGMUND KATZ
Attorney & Counsellor at Law
No. 30-7177600
Qualified in Nassau County
Cert. filed with New York County Clerk
Commission Expires March 30, 1974

JOWN A WELLS

OTTO E ROFGEL
CAFSAN E PITASSY
EUGENE I BONDY, JR
PREDERICA W P LIJHENIEN
STUART A JACASON
M ALLEN LOCMMER
ROBERT E FHISCH
WILLIAM F ROEGEL
WILLIAM F ROEGEL
WILLIAM F ROEGEL
MILLIAM F ROEGEL
JOHN B LOUGHRAN
LEO P LARRIN, JR
STANLEY GODOPSAY
MERBERT C EARNSHAW
ROGER A CLARR
DAVID F DOBBINS
ROBERT D LARSEN
LAUSON M STONE
CHARLES Y PARSELIN
MORMAN S OSTROW
WILLIAM W OWENS
LAUSON M STONE
CHARLES PARSELL
MILLIAM W OWENS
LAUSON M STONE
CHARLES A SIMMONS
JOSEPH DIAMOND
ANTHONY F. ESSAYE
RICHARD N. WINFIELD
JAMES E ROEGEL
WILLIAM S GREENWALT
PETER R FISHER
ROBERT A LINDGREM
GUT C. QUINLAN
JONEN J SHEENY
ROCER TUTTLE, JR.
JOSEPH N SPAIN
WARD B STEVENSON, JR.
ALAN M. BERMAN
ROBERTAS RARMEL
GEORGE O CESHENSRY
MOWARD B. STEVENSON, JR.
ALAN M. BERMAN
ROBERTAS RARMEL

Roycell, Korgel & Wells Two Hundred Park Svenue New York, N.Y. 10011

TELEPHONE 072-7000 1773

August 10, 1973

WASHINGTON DITHE

EUROPEAN OFFICES

H CHESTER GRANT RESIDENT PAHTNER

24, RUE DE MADRIO 75008 PARIS, FHANCE TELEN 29617

28, RUE D'ECOSSE 1080-BRUSSELS, BELGIUM TELEX 23489

CABLE ADDRESS
'YORKLAW' NEW YORK
'WALAW' WASHINGTON
'EURLAW' BRUSSELS
'EURLAW' BRUSSELS

The Honorable Asa S. Herzog
Referee in Bankruptcy
United States District Court
for the Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Matter of Sapphire Steamship Lines, Bankrupt (Allied Van Lines, Inc.)

Dear Referee Herzog:

We represent Allied Van Lines, Inc., one of the major unsecured creditors in this proceeding. We are writing in connection with the application of Messrs. Winthrop, Stimson, Putnam & Roberts that the Court award that firm a fee directly from the estate as compensation for the services which the firm has rendered on behalf of the estate in connection with matters concerning the settlement of the Washington, D.C. antitrust action by the Trustee.

It is our sincere view that the present settlement offer from the antitrust defendants which exceeds \$2.4 million, including attorneys' fees, was brought about in large part by the very substantial amounts of time and effort expended by Winthrop, Stimson in objecting to the earlier settlement offer of \$1.6 million, including attorneys' fees. Certainly, Special Counsel for the Trustee can not be credited with very much, if any, of this substantial increment in the settlement proceeds since Special Counsel was urging the Trustee of the Court to accept the lower amount. While we recognize that the United States Attorney rendered significant assistance on the objections to the earlier settlement offer, all concerned are aware that except for the initiative, diligent efforts and professional services rendered by Winthrop, Stimson during the past three years the current, substantially increased settlement offer would not have been made.

Accordingly, although we oppose the current settlement offer for the reasons stated by Winthrop, Stimson in their memorandum dated July 12, 1973, we wish to inform the Court, on behalf of our client, that in the event the current settlement offer is approved, we have no objection to the award of a fair and reasonable fee to Winthrop, Stimson from the estate in connection with the foregoing services which it has rendered on behalf of the estate, and indirectly, on behalf of all creditors. As to the amount of the fee, we are sure that the Court will consider all relevant facts and circumstances and make an award which is fair and proper in amount.

Sincerely,

Joseph H. Spain

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

AFFIDAVIT OF

-of-

: DAVID P. DAWSON

SAPPHIRE STEAMSHIP LINES, INC.,

No. 67-B-252

Bankrupt.

COUNTY OF NEW YORK)

DAVID P. DAWSON, being duly swcrn, deposes and says:

- 1. I am attorney for Voyage Repair Corp., an unsecured creditor with a claim of approximately \$35,000 in the above-entitled action.
- 2. I have read the Referee's Certificate on Allowances wherein the Referee has approved an application for fee by Mr. Alioto in the sum of \$369,626, and has denied any compensation to the firm of Winthrop, Stimson, Putnam & Roberts from the estate.
- 3. I submit this affidavit in support of the application for an award of fee and disbursements by Winthrop, Stimson, Putnam & Roberts as the increase of \$873,070 in the settlement of the antitrust litigation in which the bankrupt was plaintiff would not have occurred except for the initiative, diligent efforts and professional services rendered by Winthrop, Stimson during the past three years in opposing the original settlement

offer of \$1,600,000 and in producing evidence of damage suffered by the plaintiff which resulted in the final settlement of \$2,473,070.

- 4. Since Mr. Alioto, Special Counsel to the Trustee, strongly urged acceptance and approval of the \$1,600,000 settlement offer, and the increase of some \$873,000 in the settlement was due largely to the skill and professional services rendered by Winthrop, Stimson, my client and I urge that Winthrop, Stimson be awarded a fair and reasonable fee for their services in enhancing the estate in this manner.
- I am attaching a copy of my letter of August 28,
 1973 addressed to the Referee.

Respectfully submitted,

David P. Dawson

New York, New York March 4, 1974

Sworn to before me this 4th day of March, 1974

Notary Public

JAMES C. McMAHON, JR.
Notary Public, State of New York
No. 31-4509064
Qualified in New York County
Commission Expires March 30, 1978

PROCTOR IN ADMIRALTY
ATTORNEY AT LAW

118 EAST 60th STREET NEW YORK, N. Y. 10022 CABLE "DAPDAW" (212) 832-1370 August 28, 1973

The Honorable Asa S. Herzog Referee in Bankruptcy United States District Court for the Southern District of New York United States Court House Foley Square New York, N.Y. 10007

> Re: Matter of Sapphire Steamship Lines, Bankrups Voyage Repair Corp.

Dear Referee Herzog:

I represent Voyage Repair Corp. one of the unsecured creditors in this proceeding. I am writting in support of the application of Messrs. Winthrop, Stimson, Putnam & Roberts that the Court award it a fee directly from the estate as compensation for its services rendered on behalf of the estate in the settlement of the Washington, D.C. antitrust action by the Trustee.

In my opinion the present substantially increased settlement offer from the antitrust defendants would not have been made but for the initiative, diligent efforts and professional services rendered by Winthrop, Stimson during the past three years.

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EXHIBIT 4, ATTACHED TO STIPULATION

Accordingly, although I oppose the current settlement offer for the reasons stated by Winthrop, Stimson in their memorandum dated July 12, 1973, I wish to inform the Court, on behalf of my client, that I have no objection to the award of a fair and reasonable fee to Winthrop, Stimson from the estate in connection with the foregoing services which it has rendered on behalf of the estate, and indirectly, on behalf of all creditors.

Sincerely,

DAVID P. DAWSON

DPD/Eh

PRDF:b

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

AFFIDAVIT

SAPPHIRE STEAMSHIP LINES, INC.,

67 B. 252

Bankrupt.

:

STATE OF NEW YORK)

COUNTY OF NASSAU

and says:

PETER R. DE FILIPPI, being duly sworn, deposes

- 1. I submit this affidavit in connection with an application by the law firm of Winthrop, Stimson, Putnam & Roberts (hereinafter referred to as Winthrop, Stimson) for an allowance of counsel fees. The requested counsel fees are for work performed by Winthrop, Stimson in connection with the settlement of an antitrust action brought by the Trustee in Bankruptcy on behalf of Sapphire Steamship Lines, Inc., which action was pending in the United States District Court for the District of Columbia.
- 2. I am presently Law Secretary to Justice Albert A. Oppido, Supreme Court, Nassau County. During the period October, 1968 April, 1971, I was an Assistant United States Attorney in the Southern District of New York. As

such I represented the interests of the United States in connection with this matter from early 1970 through March, 1971. On September 14, 1970, I submitted an affidavit in support of the objections of the United States to the offers of compromise and settlement of the aforesaid antitrust action. In that affidavit, the United States opposed the offers of compromise totalling \$1,600,00. on the grounds of inadequacy. A hearing was held on September 14, 1970 before the Honorable Asa S. Herzog, Referee in Bankruptcy, on the proposed compromise. Following that hearing, Referee Herzog, in a decision dated September 21, 1970, accepted recommendations of the Trustee, his General Counsel and his Special Counsel and approved the compromise.

3. On October 8, 1970, a joint application for rehearing was presented by the United States and E. Bergendahl Co., Inc.. Submitted in support of that application were affidavits from Erling Thompsen, the Treasurer and Chief Accounting Officer of Sapphire Steamship Lines, Inc. from the commencement of its business until Sapphire was adjudicated a bankrupt; Arnold Weissberger, the President of Sapphire Steamship Lines from March of 1965, and Terrance H. Benbow, a member of the firm of Winthrop, Stimson, the attorneys for E. Bergendahl Co., Inc.. This joint application was submitted following lengthy conferences between myself and several members of the firm of Winthrop, Stimson. At these conferences, I relied to a great extent

on the expertise of Mr. Terrance Benbow in antitrust litigation. Since the principal issue before Referee Herzog concerned the question of damages and how the damages could be established attrial, Mr. Benbow's knowledge and experience were invaluable. At these conferences it was our joint decision to attempt to establish the loss of revenue suffered by Sapphire by the use of the available financial records of Sapphire Steamship Lines, Inc.. In connection with this decision, the efforts of Mr. Erling Thompsen were especially helpful. It was through Mr. Thompsen that the pertinent records were culled from the voluminous records of Sapphire stored at the Unlerwriter's Salvage Company of New York. It must be pointed out that Mr. Thompsen's cooperation was secured primarily through the efforts of Winthrop, Stimson. Mr. Thompsen, in his affidavit dated October 8, 1970, set forth the records of Sapphire that he was able to locate and stated that the missing records (general ledger cards, check register, voucher register) could be recreated by a competent . accountant. Mr. Thompsen's opinion was especially significant because of his position as the Chief Accounting Officer of Sapphire and because one of the principal reasons advanced by Referee Herzog for his approval of the compromise settlement was the fact that the basic accounting records of the bankrupt Sapphire Steamship Lines, Inc. were missing.

- Thereafter, efforts were made by myself and the firm of Winthrop, Stimson to secure accountants who could recreate the financial records of Sapphire. These efforts initially proved unsuccessful. However, I was able to secure the cooperation of the Internal Revenue Service and the United States Department of Commerce, Maritime Administration. At my request, the Internal Revenue Service assigned two Internal Revenue agents, Louis Frank and Albert Werner, to work on the records of Sapphire. These agents worked for several days at the Underwriter's Salvage Company analyzing the voyage revenue and expense folders of Sapphire Steamship Lines, Inc.. In this effort, Mr. Erling Thompsen assisted in interpreting the pertinent folders. The analysis that resulted from these efforts was then verified from cargo manifests and was further verified from the cargo lifted reports MSTS Form 4610 through 38, supplied by the Department of the Navy, Military Sea Transportation Service, Atlantic Division. This analysis was further assisted by Mr. Max Stavis, the Chief of the Audits Branch, United States Department of Commerce, Maritime Administration.
- 5. The above analysis formed the basis of an affidavit that I submitted on November 27, 1970, which affidavit incorporated affidavits by Louis Frank, Albert Werner, Max Stavis and Erling Thompsen. Prior to the completion of this analysis, a joint memorandum of law had been submitted in support of the joint application of the United States of

America and E. Bergendahl Co., Inc.. This memorandum of law combined my efforts and the efforts of Winthrop, Stimson.

Subsequently another joint memorandum of law, dated November 27, 1970 was submitted by the United States of America and E. Bergendahl Co., Inc.. This memorandum was prepared at the offices of Winthrop, Stimson by myself and members of the firm of Winthrop, Stimson. This memorandum of law was submitted in response to the affidavit of Maxwell M. Blecher, Special Counsel to the Trustee in Bankruptcy, dated November 21, 1970, in support of the proposed comprenise settlement.

6. In a decision, dated December 18, 1970, Referee Herzog granted the motion for reconsideration and reargument and upon reconsideration, disapproved the compromise and vacated the Order of September 29, 1970. On February 8, 1971, Special Counsel to the Trustee and the attorney for the Trustee submitted an application for reconsideration and rehearing to Referee Herzog. In connection with this application, another joint memorandum of law was submitted by the United States of America and E. Bergendahl Co., Inc. in opposition to this application. This memorandum of law represented the combined efforts of the United States Attorney's Office and the firm of Winthrop, Stimson. In a decision dated May 24, 1971, the motion for reargument was granted and upon reargument, the decision dated December 18, 1970 was adhered to and the compromise was disapproved.

7. Prior to this latter decision, I left the United States Attorney's Office and I have no personal knowledge of any of the events occurring thereafter.

PETER R. DE FILIPPI

Sworn to before me this 28th day of February, 1974.

Notary Public

PRAIDE A. VASSALIO NOTARY SUTLIC, State of Hew York No. 30-4019913 - Hereu County Commission Expirer Merch 20, 1975

UNITED STATES DISTRICT COURT		
SOUTHERN DISTRICT OF NEW YORK		
	-x	
In the Matter	:	
-of-	•	AFFIDAVIT OF
SAPPHIRE STEAMSHIP LINES, INC.,		STEVEN THALER
Bankrupt.		No. 67-B-252
	-x	
STATE OF NEW YORK)		
COUNTY OF NEW YORK)		

STEVEN THALER, being duly sworn, deposes and says:

I am an attorney-at-law associated with the firm of Markowitz and Glanstein, representing Marine Engineers' Beneficial Association with a claim of approximately \$30,000 against the Bankrupt, Sapphire Steamship Lines, Inc.

On behalf of our client, we are submitting this affidavit in support of the application by the firm of Winthrop,
Stimson, Putnam & Roberts for attorney's fee to be awarded from
the Bankrupt's estate for services which they have rendered for
the benefit of all creditors in connection with the settlement
of the District of Columbia anti-trust case recently settled
for the amount of \$2,473,000. We and our client believe that

this court should award a fee to Winthrop, Stimson for its services which were substantial and very important in obtaining an increase from \$1,600,000, which special counsel had urged be accepted, to \$2,473,000, for which the anti-trust case was settled.

We believe that this fee should be paid out of the increase of \$873,000 in the settlement as all general creditors have benefitted from this enhancement in the estate, and no attorneys for general creditors other than the law firm of Winthrop, Stimson, Putnam & Roberts participated in the lengthy and involved proceedings subsequent to the initial hearing in this matter.

S/S Steven Thaler

Steven Thaler

Sworn to before me on this 4th day of March, 1974.

S/S Donna B. Ceccarelli

Notary Public

[SEAL]

UNITED STATES DISTRICT COURT		
SOUTHERN DISTRICT OF NEW YORK		
	· x	
In the Matter		
-of-	:	No. 67-B-252
SAPPHIRE STEAMSHIP LINES, INC.,	:	
Bankrupt.	:	
	· x	

MEMORANDUM OF WINTHROP, STIMSON, PUTNAM & ROBERTS IN SUPPORT OF ITS OBJECTIONS TO THE REFEREE'S CERTIFICATE ON ALLOWANCES

WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for E. Burgendahl Co., Inc.
(New York) and E. Burgendahl Co., Inc.
(Philadelphia), et al.
40 Wall Street
New York, New York 10005
(212) WH 3-0700

TERENCE H. BENBOW VICTOR S. TRYGSTAD STEVEN A. BERGER,

Of Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

-of- :

: No. 67-B-252

SAPPHIRE STEAMSHIP LINES, INC., :

Bankrupt.

MEMORANDUM OF WINTHROP, STIMSON PUTNAM & ROBERTS IN SUPPORT OF ITS OBJECTIONS TO THE REFEREE'S CERTIFICATE ON ALLOWANCES

On February 8, 1974 Referee Asa S. Herzog issued a Certificate on Allowances recommending to this

Court the attorneys' fees to be awarded and disbursements
to be reimbursed for the services rendered in connection
with the prosecution of an antitrust action on behalf of
the Bankrupt estate. The recommendation of the Referee
is that Joseph Alioto, Special Counsel to the Trustee,
be awarded a fee in the sum of \$369,626 together with
disbursements, when properly documented, of \$28,070.12.
On the other hand, in spite of essential services and
substantial benefits rendered to the estate, the Referee
recommends that Winthrop, Stimson's application for an
attorney's fee of \$175,000 and reimbursement for \$3,000

in disbursements be "denied in toto," concluding that Winthrop, Stimson "must look to their clients for compensation and cannot be allowed any compensation from this estate" for the 1,769 hours necessarily expended by our firm. This memorandum is submitted in support of Winthrop, Stimson's objections to the Referee's Certificate on Allowances to the extent that the Referee recommends denial of our application.

PRELIMINARY STATEMENT

taining to our services and the legal and equitable basis for our application are set forth in the "Memorandum of Winthrop, Stimson, Putnam & Roberts in Support of its Application for Attorney's Fee and Reimbursement for Disbursements" dated August 16, 1973 previously submitted to the Referee, a copy of which is submitted herewith and incorporated herein. Accordingly, we will not burden this Court with unnecessary repetition of the facts and law presented to the Referee in that earlier Memorandum. As shown herein, however, we respectfully submit that the Referee in his Certificate on Allowances has misconstrued the underlying facts, relied on general legal principles wholly

inapplicable to the instant application and completely ignored the legal and equitable basis for our claim. We therefore offer the following in an effort to summarize our position and respond to what the Referee has submitted to this Court as the factual and legal basis for his recommendation to deny our application in toto.

ARGUMENT

POINT I

A REVIEW OF THE UNDERLYING FACTS CLEARLY MANIFESTS THAT THE SER-VICES RENDERED BY WINTHROP, STIM-SON HAVE SUBSTANTIALLY ENHANCED THE ESTATE TO THE BENEFIT OF ALL CREDITORS

Although expressly stating that it was <u>not</u> the more important basis for his recommendation to deny our application, Referee Herzog stated:

"In the first place, I must point out that I reversed my original stand and disapproved the first offer primarily because I was impressed with the evidence produced by the internal revenue agents who were put to work on the case by the Government. The attorney for the creditors cannot take full credit for the disapproval of the first offer." (Certificate on Allowances, dated February 8, 1974, p. 10)

First, as a reading of our earlier Memorandum will demonstrate (pp. 5-41), we at no time have ever attempted to "take full credit" for all efforts expended in opposition to the \$1,600,000 settlement offer.

Secondly, the decision of the Referee dated

September 21, 1970, approving the original offer of settlement, clearly indicated that the critical factor which

motivated the Referee to approve the earlier settlement

offer was his reliance upon Special Counsel's representation

that although the Bankrupt's position on the issue of liability

was strong, it would be extremely difficult to prove damages

due to the fact that certain critical accounting records of

the Bankrupt were missing and that certain key witnesses were

unavailable. It is beyond dispute that that portion of the

motion for reconsideration, demonstrating the availability of

accounting records and witnesses, was attributable solely to

the efforts of our firm.

Thirdly, Referee Herzog's statement as to his reliance upon the evidence produced by the internal revenue agents carries with it a connotation that Winthrop Stimson played no part in the development of that evidence. Lest the Court be misled, we are submitting herewith an affidavit dated February 28, 1974 of Peter R. DeFilippi (the assistant United States attorney who represented the Government's interest at the time of the bringing on of the motion for reconsideration) a reading of which clearly demonstrates the substantial part that Winthrop Stimson played in the development of the evidence produced by the Government's witnesses.

What must be emphasized, however, is that in looking back upon the last three and one-half years, and the respective roles played by all interested parties, we believe that the conclusion is inescapable that, had it not been for the initiative and direction of Winthrop, Stimson, the antitrust action would have been settled for \$1,600,000 instead of the enhanced settlement of \$2,473,070.12, recently approved by the Referee. Under these circumstances we respectfully submit that there is no basis for the Referee's conclusion that the estate was merely "incidently enhanced" as a result of our efforts. (Certificate on Allowances, dated February \$, 1974, p. 10)

In characterizing the services performed by our firm and the resulting benefits obtained, the Referee states:

"What they did, they did for their clients; their clients will reap the benefit of their services; they must look to their clients for payment." (Certificate on Allowances, dated February 8, 1974, p. 10)

We fail to perceive how the Referee could possibly conclude that our clients will reap the benefits of our services and therefore they alone must pay for the services which we performed. Even if we assume the best estimate of the general creditors' participation in the estate, our clients' share of the estate will be under \$90,000 (75% of our clients' total claims of \$118,000) out of which, the Referee concludes, they are to compensate us for the 1,769 hours our firm has expended in connection with this matter.

If this Court, however, were to accept the Referee's recommendation denying our application, in toto, the other general creditors will receive seventy-five cents on the dollar as a direct result of the increased settlement offer and their respective shares of the estate will be wholly unencumbered by any fee for the legal services performed which enable them to participate in the estate at all. We submit that the inequities inherent in accepting the Referee's recommendation and the appropriate disposition are equally apparent. As stated in In re Little River Lumber Co., 101 F. at 558 (N. D. Ark. 1900):

"The injustice of requiring the intervening creditor to pay the attorney is manifest. His distributive share of the funds preserved to the estate would not pay one-third of the attorney's fee if he were required to pay for the services. It is inequitable and unjust to permit the other creditors to avail themselves of his services, accompanied by the necessary risk, involving costs, etc., and then share in the estate without contributing to the payment of the attorney who did the work." 101 F. at 559 (emphasis added).

Furthermore, in granting Special Counsel's application for attorneys' fees and disbursements, Referee Herzog made mention of the fact that "no opposition to Mr. Alioto's request for compensation has been voiced by creditors."

(Certificate on Allowances, dated February 8, 1974, p. 9)

In passing upon our application, however, the Referee neglected to note that not only had no objection been filed to our application by either the Trustee or any creditor, but that several of the major general creditors, had, in fact, submitted letters

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EXHIBIT 7, ATTACHED TO STIPULATION

strongly supporting our application. We are submitting herewith affidavits executed by most of those same general creditors manifesting their continued support for our application.

POINT II

THE BANKRUPTCY COURT HAS THE POWER TO MAKE AN AWARD TO WINTHROP, STIMSON FOR ITS SERVICES WHICH ENHANCED THE ESTATE EVEN THOUGH WINTHROP, STIMSON WAS NOT APPOINTED BY THE COURT AS SPECIAL COUNSEL

As we pointed out in our earlier Memorandum (pp. 41-44), it has long been recognized that the provisions of the Bankruptcy Act dealing with the awarding of attorney's fees are not exclusive and that, in appropriate circumstances, it is well within the powers of the bankruptcy court to make such awards as justice and equity might dictate. In re Swofford, 112 F. Supp. 893, 895 (D. Minn. 1952) aptly summarizes this position:

"The authority of the bankruptcy court to tax attorney's fees as costs, in the absence of statutory authorization, rests in its equitable jurisdiction. . . .

". . . The failure of Congress to provide expressly for attorney's fees in the instant situation does not, of itself, render a court's use of the equitable doctrine inconsistent with the Act."

One situation universally considered appropriate for the exercise of equitable powers to award attorney's fees is that in which an attorney has taken upon himself the protection of a fund or has created a fund in which others may share. See 6 Moore's Federal Practice ¶ 54.77[2], at 1704-07 (2d ed. 1972); see also Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). Bankruptcy courts have recognized this principle and are uniformly of the belief that although the power to award fees must be exercised sparingly in order to effectuate the Bankruptcy Act's policy of economy for the estate, the exercise of that power is appropriate where "a tangible benefit has been conferred on the estate to the advantage of the creditors as a whole." Saper v. John Viviane & Son, Inc., 258 F.2d 826 (2d Cir. 1958).

We are aware of the general proposition that a creditor's attorney's fee is not to be paid from the bankrupt estate. We submit, however, that the courts have created a widely-recognized exception to that proposition, the requirements of which are met by the instant situation. Thus, where (1) the trustee has refused or neglected to act and (2) the creditor's attorney has conferred a tangible benefit on the estate by acting in the trustee's stead, compensation from the estate will be allowed. In re New York Investors, Inc., 130 F.2d 90 (2d

Cir. 1942); In re Otto-Johnson Mercantile Co., 48 F.2d
741, 742 (10th Cir. 1931); In re Roadarmour, 177 F. 379
(6th Cir. 1910); In re Alta Vineyards Co., 87 F. Supp.
608 (S.D. Cal. 1949); In re J. A. Rudy & Sons, 30 F. Supp.
8 (W.D. Ky. 1939); In re Cheney, 300 F. 465 (D. Mass. 1924);
In re Little River Lumber Co., supra; see also Collier on
Bankruptcy, ¶¶ 62.21 at 1553, 62.29 [2.2] at 1571-72, 62.29
[2.4] at 1577-78 (14th ed. 1972). Compensation will be denied to creditors (i.e., their attorneys) only "when the trustee is functioning in their behalf." In re Otto-Johnson Mercantile Co., supra at 742. In short, this exception to the general rule rewards those who have enhanced the bankrupt estate while assuring that principles of economy will not have been violated by payment for needless services.

In <u>In re Little River Lumber Co.</u>, <u>supra</u>, the trustee and his counsel declined to act to resist a claim filed by a creditor. Counsel for another of the creditors successfully defeated the claim and, in so doing, enhanced the estate for the benefit of all creditors. In upholding the referee's allowance of fees to the creditor's attorney, the court said:

"This allowance . . . is allowed under the general equity powers of the bankruptcy court. It seems to me that, on well-recognized equitable principles, an attorney who, under the circumstances of

this case, intervened and successfully resisted an unjust claim, ought to be paid by the estate which was benefited by his services. The injustice of requiring the intervening creditor to pay the attorney is manifest. His distributive share of the funds preserved to the estate would not pay one-third of the attorney's fee if he were required to pay for the services. It is inequitable and unjust to permit the other creditors to avail themselves of his services, accompanied by the necessary risk, involving costs, etc., and then share in the estate without contributing to the payment of the attorney who did the work." 101 F. at 559 (emphasis added).

In re Cheney, supra (discussed in our original Memorandum pp. 45-46), is yet another illustration of the exception to the general rule. In that case, trustee's counsel expressed the opinion that only a small portion of the interest in a certain trust fund belonged to the bankrupt estate. As a result of the trustee's refusal to attempt to obtain a larger part of that interest, counsel for certain creditors instituted proceedings which resulted in a recovery in excess of the amount originally sought by the trustee. Fees were awarded to the attorneys whose services had enhanced the estate. The factual similarity of Cheney to the instant situation is striking, particularly in that in both cases the genesis of services by a creditor's attorney was a difference of opinion between the trustee and the creditors. Accordingly, we submit that a review of the services performed by our firm and the resulting benefits

conferred upon the estate as a whole (Memorandum pp. 5-41) clearly manifest the applicability of the above-stated principles to the facts in the instant case.

Referee Herzog, however, in apparent disregard of the above-cited authorities and the attendant factual circumstances, attempts to justify his recommendation to deny our application by stating:

"At no time were they acting as attorneys or special attorneys to the trustee, nor was any order made authorizing them to act for the trustee in any capacity whatsoever. What they did, they did for their clients; their clients will reap the benefit of their services; they must look to their clients for payment.

"It could pave the way to grave abuse, if without being authorized to act by the court, counsel for creditors could look to estates for compensation because in the process of representing and protecting their clients, the estate was incidently enhanced." (Certificate on Allowances, dated February 8, 1974, p. 10) (Emphasis in original)

Although there are numerous authorities cited for the proposition that there is an implied exclusion of all legal service charges not specifically authorized by the Bankruptcy Act, it is worthy of note that even such authorities generally recognize an exception where the trustee has refused to act or failed to act for the best interests of the estate. As was stated in <u>In re Ira Haupt & Co.</u>, 280 F. Supp. 341 (S.D.N.Y. 1967):

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"If creditors undertake to do the trustee's job for him, they do it gratuitously (in the absence of court order or the trustee's failure to act)."

Id. at 344 (emphasis added). See also In re

Joslyn, 224 F.2d 223 (7th Cir. 1955).

The exception to the rule seems so widely-recognized as to be impossible to ignore, yet this is precisely what the Referee has chosen to do.

Rather, the Referee has chosen to cite authority which stands for the general proposition that a creditor's attorney is not to be compensated from the bankrupt estate. As stated above, we do not deny the validity of that rule as a general matter but simply assert that the present situation falls within the well-defined exception to the general rule. In re Siegel, 252 F. 197 (S.D.N.Y. 1918), is one of the cases so cited by the Referee and is correct in its application of the general rule simply because its facts require no other result. Indeed, a portion of the opinion quoted, but not emphasized, in Referee Herzog's certificate indicates a recognition of the exception which we have outlined:

"An estate in the custody of a court is not in need of voluntary services; there is no room for the doctrine of salvage. It is presumably being cared for adequately. . . . " 252 F. at 198 (emphasis added).

Thus, if the presumption that the estate is "being cared for adequately" is rebutted, i.e., if it can be shown that the trustee has neglected or refused to act, the general rule of

disallowance should be disregarded. Accordingly, <u>Siegel</u> cannot be viewed as authority for denying the instant application since, even though it was there assumed that counsel for the creditors' committee did, in some degree, benefit the estate, there was no finding that the receiver had ceased to function or would not have accomplished the same result.

In ignoring the exception for situations in which the trustee has failed to act for the benefit of the estate, the Referee has chosen to base his recommendation upon another general prerequisite for the awarding of fees, the requirement that the court's permission must be obtained prior to the rendering of services for which a creditor's attorney expects compensation. The Referee relies heavily upon Sartorius v. Bardo, 95 F.2d 387 (2d Cir. 1938), for the proposition, but does not quote extensively enough from that case. Thus, the Referee chooses to quote only from that portion of Judge Hand's opinion dealing with that part of the application for compensation involving services performed at the "invitation" of the trustee. Further on, and on the same page as quoted by the Referee, Judge Hand recognizes the precise exception on which we rely in support of our application, stating:

"The same is not true, however, of their opposition to the application to sell the Scarsdale mortgage; obviously if a creditor successfully opposes a proposal of the trustee,

it is no answer to his demand for payment to say that the trustee was in charge; by hypothesis his intervention was necessary. Hence the judge would not have been justified in denying this part of the petition, if any substantial advantage could be traced to the services." 95 F.2d at 390.

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Notwithstanding the above however, the Referee, in reliance upon Matter of Porto Rican American Tobacco Company, 117 F.2d 599 (2d Cir. 1941), blindly follows the prior approval rule concluding that he "must" recommend denial of our application because "[t]he courts have shown no inclination to relax (Curtificate, p. 12) this rule" and that to do so in this case "could pave the way to grave abuse." (Certificate, p. 10) We respectfully submit that the Referee has simply misread the law.

One year after the Second Circuit's decision in Matter of Porto Rican American Tobacco Company, the Second Circuit did find justification for relaxing the prior approval rule in In re New York Investors, Inc., 130 F.2d 90 (2d Cir. 1942), the essential facts of which we submit are indistinguishable from the instant case.

In <u>New York Investors</u> the largest creditor of the estate, without prior approval of the court, appealed the district court's award of compensation to the trustee and his counsel and was successful in having the awards reduced. After expressly referring to their reaffirmation of the prior approval rule in <u>Porto Rican American Tobacco</u>

<u>Company</u>, the court nonetheless thought that the circumstances justified a relaxation of the rule stating:

"Trustees cannot be expected to take appeals from their own allowances. They are in a scarcely better position to appeal from allowances to their counsel, who would certainly be unlikely to advise such appeals. It is true that the RFC might have applied to the District Court for an order authorizing it at the expense of the estate to raise objections to excessive compensation to the trustees and their attorneys, and to appeal from orders awarding too high compensation. But it seems to us that the efficient administration of the estate would have been but little promoted by such a step, even though it might have been better practice to seek a pre-liminary order. It is true that several creditors may seek compensation for opposing allowances to trustees and their attorneys, and then the very difficulties may arise which an initial order was designed to prevent. But denial of all compensation in a situation like the present entails great hardship to the applicant and brings few advantages to offset this hardship. Where the creditor has not unnecessarily duplicated the efforts of others, and where his services are such as the trustees cannot reasonably have been expected to perform, little difficulty can arise from omitting the requirement. Since this is so, we think that considerable freedom in raising objections, for the benefit of the estate, to allowances which the trustees are unable or most unlikely to question, may wisely be accorded to interested creditors, and we will not here penalize the applicant for a departure from the better practice which appears not to have prejudiced the administration of the estate." 130 F.2d at 92 (emphasis added).

The applicability of <u>New York Investors</u> to the present situation is manifest - (1) our efforts were clearly not duplicative of anyone else's efforts, and (2) not only

was it reasonable to assume herein that the Trustee would not act but the Trustee, his Counsel and Special Counsel as a result of their strong support for the \$1,600,000 settlement offer have, in effect, been our adversaries almost throughout our participation in this matter. Accordingly, just as the conclusion was reached in New York Investors that "little difficulty can arise from omitting the requirement" of prior court approval for the services rendered so should this Court reach the same conclusion in passing upon our application.

Additionally, the Referee has relied upon General Order 44 and Rule 215(a) of the Rules of Bankruptcy Procedure as establishing a statutory requirement of prior court approval. [Rule 215(a) is not intended to differ substantially from its predecessor, General Crder 44. See Advisory Committee's Note, Rule 215(a), Rules of Bankruptcy Procedure.] In the Referee's Certificate (p. 11), a portion of Rule 215(a) is set out as follows: "No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. . . . "When, however, one reads the next sentence of Rule 215(a), "The order shall be made only upon application of the trustee or receiver. . . , " it becomes clear that the Rule has no application to the present situation. Since the application for the court order is required to be made by the trustee, the

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Rule obviously does not attempt to encompass a situation in
which creditor's counsel must step in because the trustee
has ceased to act for the best interests of the bankrupt
estate. Rather, the Rule contemplates a situation in which
the trustee desires to employ counsel to assist him. In
short, the Rule is irrelevant with respect to our application
for fees.

In sum, therefore, the applicability of <u>New York</u>

<u>Investors</u> is manifest and, accordingly, the Court should conclude that this is clearly an appropriate situation not to apply the prior approval rule and to award the fee for which we now apply.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Referee's recommendation denying in toto Winthrop, Stimson, Putnam & Roberts' application for \$175,000 as attorneys' fees for legal services rendered to the estate and \$3,000 for disbursements incurred in connection therewith should be rejected and the application granted in all respects.

Dated: New York, New York March 4, 1974

Respectfully submitted,

WINTHROP, STIMSON, PUTNAM & ROBERTS

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VICTOR S. TRYGSTAD STEVEN A. BERGER

Notice of Appeal to Court of Appeals.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. Read Smith, as Trustee in Bankruptcy, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order entered by Hon. Milton Pollack, United States District Judge, dated March 15, 1974, which disaffirms the Certificate of Allowance of Hon. Asa S. Herzog, Bankruptcy Judge, dated February 8, 1974, insofar as disallows the allowance application made by Winthrop, Stimson, Putnam & Roberts, Esqs.

Dated: Brooklyn, New York April 8, 1974

> LOUIS P. ROSENBERG Attorney for Trustee

To:

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ATTORNEYS FOR PUTMANT RODERTS